REPORTS OF CASES

DECIDED BETWEEN

MARCH 2, 1957 and JULY 5, 1957

IN THE

Supreme Court of Nebraska

JANUARY TERM 1957

VOLUME CLXIV

WALTER D. JAMES

OFFICIAL REPORTER

GANT PUBLISHING COMPANY

LINCOLN, NEBRASKA

1958

Copyright A. D. 1958

By WALTER D. JAMES, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

ROBERT G. SIMMONS, Chief Justice
EDWARD F. CARTER, Associate Justice
FREDERICK W. MESSMORE, Associate Justice
JOHN W. YEAGER, Associate Justice
ELLWOOD B. CHAPPELL, Associate Justice
ADOLPH E. WENKE, Associate Justice
PAUL E. BOSLAUGH, Associate Justice

WALTER D. JAMES	Reporter
JACQUELYN M. LEACH	Assistant Reporter
GEORGE H. TURNER	Clerk
WALTER G. PURTZER	Deputy Clerk
CLARENCE S. BECK	Attorney General
CLARENCE A. H. MEYER	Deputy Attorney General
HOMER L. KYLE	Assistant Attorney General
HAROLD S. SALTER	Assistant Attorney General
HOMER G. HAMILTON	Assistant Attorney General
RALPH D. NELSON	Assistant Attorney General
RICHARD H. WILLIAMS	Assistant Attorney General
GERALD S. VITAMVAS	Assistant Attorney General
CECIL S. BRUBAKER	Assistant Attorney General
EDWARD F. CARTER, JR.	Assistant Attorney General

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	Residence of Judge
First	Johnson, Nemaha, Pawnee, and Richardson.	Virgil Falloon	Falls City
Second	Cass, Otoe, and Sarpy.	John M. Dierks	Neb. City
Third	Lancaster.	John L. Polk Harry Ankeny Harry A. Spencer Paul White	Lincoln Lincoln Lincoln Lincoln
Fourth	Burt, Douglas, and Washington.	James M. Fitzgerald Herbert Rhoades Arthur C. Thomsen James T. English James M. Patton Carroll O. Stauffer L. Ross Newkirk Patrick W. Lynch Jackson B. Chase	Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York.	H. Emerson Kokjer John D. Zeilinger	Wahoo York
Sixth	Boone, Colfax, Dodge, Merrick, Nance, and Platte.	Russell A. Robinson Robert D. Flory	Fremont Columbus
Seventh	Fillmore, Nuckolls, Saline, and Thayer.	Stanley Bartos	Wilber
Eighth	Cedar, Dakota, Dixon, and Thurston.	John E. Newton	Ponca
Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne.	Lyle E. Jackson Fay H. Pollock	Neligh Stanton
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster.	Frank J. Munday Edmund P. Nuss	Red Cloud Hastings
Eleventh	Blaine, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley, and Wheeler.	Ernest G. Kroger William F. Spikes	Grand Island St. Paul
Twelfth	Buffalo, Custer, Logan, and Sherman.	Eldridge G. Reed	Kearney
Thirteenth	Arthur, Banner, Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln, and McPherson.	Isaac J. Nisley John H. Kuns	North Platte Kimball
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins, and Red Willow.	Victor Westermark	McCook
Fifteenth	Boyd, Brown, Holt, Keya Paha, and Rock.	Dayton R. Mounts	Atkinson
Sixteenth	Box Butte, Cherry, Dawes, Sheridan, and Sioux.	Earl L. Meyer	Alliance
Seventeenth	Garden, Morrill, and Scotts Bluff.	Claibourne G. Perry	Gering
Eighteenth	Gage and Jefferson.	Cloyde B. Ellis	Beatrice

PRACTICING ATTORNEYS

Admitted since the publication of Volume 163

IRVING H. BAHDE, JR.
HAROLD W. BAUER
RICHARD E. BEAL
LA VON EUGENE BILLINGS
NORMAN F. BRADSHAW
JAMES A. BURBRIDGE
CHARLES DAVID BURNS
DOMENICO CAPORALE
THOMAS D. CAREY
RICHARD A. CHILDS
PAUL KYNETTE CLAYTON
ROBERT D. CONOVER
RICHARD E. CROKER
NORAN L. DAVIS
WILLIAM A. DAY, JR.
ALLEN B. EDEE
ARTHUR L. FOLEY
ROBERT W. GASCOYNE
GORDON L. GAY
F. PARKER GEESEN
MARK H. HARRINGTON
PATRICK WILLIAM HEALEY
CLARENCE E. HEANEY, JR.
JAMES L. HEATON
JOHN J. HIGGINS, JR.
HENRY L. HOLST
CHARLES EVANS HUGHES
H. TRACY HUSTON
PHILIP G. JOHNSON
JOHN WILLIAM KENNEDY
VINCENT J. KIRBY
JAMES M. KNAPP
LLOYD W. KNAPP
SIMON C. LANTZY
WILLARD D. LORENSEN
LEE T. MAGEE
ROSEMARY MARA
JOHN N. MARVEL
DAVID F. MCCANN
JOSEPH F. MCGINN
W. RICHARD MCMARTIN
RAYMOND M. MILLAN
JOHN P. MILLER
JAMES P. MONEN
BRANSON HOWARD MOORE
JAMES H. MOYLAN
ROBERT A. MUNRO
GEORGE E. NULL
ROBERT T. O'LEARY
JAMES L. PARMELEE, JR.
JAMES H. PHILLIPS
WILBUR L. PHILLIPS
HARRIS A. POLEY, JR.
DONALD F. ROCKE
HENRY L. ROSENTHAL, JR.
EDWARD T. ROSSE
STEPHEN M. SAWTELL
JAMES E. SCHNEIDER
WILLIAM E. SEIDLER
THOMAS J. SKUTT
GEORGE W. SOHL
JAMES L. SPELLMAN
RICHARD L. SPITTLER
ARNOLD J. STERN
FLOYD A. STERNS
JERRY C. STIRTZ
JERROLD L. STRASHEIM
CHARLES V. SWAN
RICHARD N. THOMPSON
RICHARD L. TORCZON
HOWARD E. TRACY
KENNETH B. TREINEN
CLARK L. WAGNER
JOHN M. WINTERS
BERNARD WISHNOW
EUGENE LEE WOHLNER
WILLIAM R. WOLPH

TABLE OF CASES REPORTED

Abel Construction Co.; Niklaus v. 842
Akins v. Chamberlain 428
All Nebraska Railroads, In re Application of, ... 247, 265
Allstate Ins. Co. v. Enzolera 38
Anderson; Combes v. 131
Anderson v. Evans 599
Application of All Nebraska Railroads, In re, ... 247, 265
Application of Ferguson Trucking Co., Inc., In re, ... 85
Application of Schaub, In re, ... 805
Auguy; Bear v. 756

Bayard, City of, v. North Central Gas Co. 819
Beacom v. Daley 120
Bear v. Auguy 756
Beck, State ex rel., v. Chicago, St. P., M. & O. Ry. Co. 60
Beck, State ex rel., v. City of York 223
Bellevue, City of; Patrick v. 196
Bezdek v. Patrick 398
Bohuslov; Slocum v. 156
Bowen; Romans v. 209
Brackhan; Burhoop v. 382
Brandt; Elliott v. 790
Bryant v. Greene 15
Buhrman v. Smollen 655
Buller v. City of Omaha 435
Burhoop v. Brackhan 382

Cambridge Co-Operative Oil Co.; Farr v. 45
Capital Bridge Co. v. County of Saunders 304
Carlson v. Schroeder 443
Caruso v. Moy 68
Central States Grain Co., Inc.; Stillinger & Napier v. 458
Chamberlain; Akins v. 428
Chicago, B. & Q. R. R. Co. v. Herman Bros., Inc. 247, 265
Chicago, St. P., M. & O. Ry Co.; State ex rel. Beck v. 60
City of Bayard v. North Central Gas Co. 819
City of Bellevue; Patrick v. 196
City of Omaha; Buller v. 435
City of Omaha; Sears v. 869
City of Scottsbluff; Hillerege v. 560

City of Scottsbluff; Schaub v. 805
City of York; State ex rel. Beck v. 223
Clausen v. School Dist. No. 33 78
Combes v. Anderson 131
County of Kimball; State v. 479
County of Saunders; Capital Bridge Co. v. 304
Coville v. School Dist. No. 37 78
Crab Orchard Rural Fire Protection Dist.; Kelle v. 593
Crawford v. State 231

Daley; Beacom v. 120
Decker; Schutte v. 582
Drew v. Hawley 141

Ecker v. Union P. R. R. Co. 744
Egenberger v. National Alfalfa Dehydrating & Milling Co. 704
Elliott v. Brandt 790
Ely; Smith v. 636
Enzolera; Allstate Ins. Co. v. 38
Estate of Knott, In re, ... 365
Evans; Anderson v. 599

Farmers State Bank; Powell v. 180
Farr v. Cambridge Co-Operative Oil Co. 45
Farrell v. School Dist. No. 54 853
Federal Ins. Co. v. International Harvester Co. 698
Felman; National Reefer Service, Inc. v. 783
Ferguson Trucking Co., Inc., In re Application of, ... 85
Ferguson Trucking Co., Inc. v. Rogers Truck Line 85
Fiala v. Tomek 20

General Credit Corp.; McNish v. 526
Grand Island Finance Co.; McNish v. 543
Greene; Bryant v. 15
Griggs v. Oak 296

Haggard v. Misko 778
Harris; McCauley v. 216
Hawley; Drew v. 141
Heath; McLaughlin v. 511
Herman Bros., Inc.; Chicago, B. & Q. R. R. Co. v. 247, 265
Hillerege v. City of Scottsbluff 560
Hoffman v. State 679
Hohensee; State v. 476
Holliday v. Patchen 53

In re Application of All Nebraska Railroads 247, 265
In re Application of Ferguson Trucking Co., Inc. 85
In re Application of Schaub 805
In re Estate of Knott 365
In re Redistricting of School Districts 78
International Harvester Co.; Federal Ins. Co. v. 698

James v. McNair 1
Jensen; S. S. Kresge Co. v. 833

Kelle v. Crab Orchard Rural Fire Protection Dist. 593
Kimball, County of; State v. 479
Knott, In re Estate of, ... 365
Knott; Reynolds v. 365
Koehn v. Koehn 169
Kresge Co. v. Jensen 833

Leach v. Treber 419
Lindquist v. Towle 524

Martin; Roll v. 133
McCauley v. Harris 216
McGree v. Stanton-Pilger Drainage Dist. 552
McLaughlin v. Heath 511
McNair; James v. 1
McNish v. General Credit Corp. 526
McNish v. Grand Island Finance Co. 543
Merner Motors; Sipprell v. 447
Misko; Haggard v. 778
Moy; Caruso v. 68

National Alfalfa Dehydrating & Milling Co.; Egenberger v. 704
National Reefer Service, Inc. v. Felman 783
Nelson v. Rasmussen 274
Niklaus v. Abel Construction Co. 842
North Central Gas Co.; City of Bayard v. 819

Oak; Griggs v. 296
Omaha, City of; Buller v. 435
Omaha, City of; Sears v. 869
O'Neill v. O'Neill 674

Parker v. State 614
Patchen; Holliday v. 53
Patrick; Bezdek v. 398

Patrick v. City of Bellevue 196
Pew v. State 735
Platte Valley State Bank; Urwiller v. 630
Powell v. Farmers State Bank 180

Rasmussen; Nelson v. 274
Redistricting of School Districts, In re, ... 78
Reed v. Williamson 99
Ress; Stewart v. 876
Reynolds v. Knott 365
Robinson v. Robinson 413
Rogers Truck Line; Ferguson Trucking Co., Inc. v. 85
Roll v. Martin 133
Romans v. Bowen 209

Saunders, County of; Capital Bridge Co. v. 304
Schaffer v. Strauss Brothers 773
Schaub, In re Application of, ... 805
Schaub v. City of Scottsbluff 805
School Dist. No. 33; Clausen v. 78
School Dist. No. 37; Coville v. 78
School Dist. No. 54; Farrell v. 853
School Dist. No. 228 v. State Board of Education 148
School Districts, In re Redistricting of, ... 78
Schroeder; Carlson v. 443
Schutte v. Decker 582
Scottsbluff, City of; Hillerege v. 560
Scottsbluff, City of; Schaub v. 805
Sears v. City of Omaha 869
Sipprell v. Merner Motors 447
Slocum v. Bohuslov 156
Smith; State v. 476
Smith v. Ely 636
Smollen; Buhrman v. 655
Speck v. Speck 506
S. S. Kresge Co. v. Jensen 833
Stanton-Pilger Drainage Dist.; McGree v. 552
State Board of Education; School Dist. No. 228 v. 148
State ex rel. Beck v. Chicago, St. P., M. & O. Ry. Co. 60
State ex rel. Beck v. City of York 223
State v. County of Kimball 479
State v. Hohensee 476
State v. Smith 476
State; Crawford v. 231
State; Hoffman v. 679
State; Parker v. 614

State; Pew v. 735
Stewart v. Ress 876
Stillinger & Napier v. Central States Grain Co., Inc. 458
Strauss Brothers; Schaffer v. 773

Tomek; Fiala v. 20
Towle; Lindquist v. 524
Towner v. Western Contracting Corp. 235
Treber; Leach v. 419

Union P. R. R. Co.; Ecker v. 744
Urwiller v. Platte Valley State Bank 630

Western Contracting Corp.; Towner v. 235
Williamson; Reed v. 99
Workman v. Workman 642

York, City of; State ex rel. Beck v. 223

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1957

JOHN W. JAMES ET AL., APPELLEES, V. GEORGE H. McNAIR, APPELLEE, IMPLEADED WITH PAUL E. WIRTH ET AL., APPELLANTS.

81 N. W. 2d 813

Filed March 8, 1957. No. 34014.

1. **Adverse Possession.** The title to land becomes complete in the occupant by adverse possession when he and his grantors have maintained an actual, exclusive, open, and continuous possession thereof, claiming title to the same against all persons, for 10 years.
2. ———. The law does not require that possession shall be evidenced by a complete enclosure, nor by persons remaining continuously upon the land and constantly from day to day performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be in its nature adapted.
3. **Trusts.** Every man has a trust to whom a business is committed by another. Every man is a trustee whose office is to advise or to operate, not for himself, but for others.
4. **Trusts: Attorney and Client.** The rules of equity which determine the consequences of acts performed by a fiduciary are not restricted to attorney and client, nor to similar conventional relations, but extend to all cases, where, on one hand, confidence is properly reposed, and, on the other, knowledge or authority or influence arises from any cause.
5. **Trusts: Principal and Agent.** A person gratuitously or officiously assuming as agent or trustee to control or manage the property or interests of another is as firmly bound by the

implied terms of his confidential relation as one who is regularly employed and paid.

6. **Estoppel.** The general rule is that in order to create an estoppel it is essential that the party against whom the estoppel is claimed acted with knowledge of the facts and asserted particular rights inconsistent with those subsequently claimed, and that the party claiming estoppel, being without knowledge or means of knowledge of the facts, was influenced by and relied upon the conduct of the person sought to be estopped, and changed his position in reliance thereon or acted upon it to his injury or prejudice.

7. **Adverse Possession.** It is the established rule in this state that when a fence is constructed as a boundary line fence between two properties, and where the parties claim ownership of the land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own.

APPEAL from the district court for Otoe County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Smith & Lebens and *O'Sullivan & O'Sullivan*, for appellants.

Edwin Moran and *Wellensiek & Morrissey*, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from a judgment of the district court for Otoe County quieting and confirming in John W. James and Vantine A. James, appellees here and plaintiffs below, the fee simple title to certain lands in that county as against Paul E. Wirth, John R. Wirth, and Anton F. Wirth, appellants here and defendants below, on the basis of adverse possession.

The lands involved are described by metes and bounds and are principally located in Section 5, Township 9, Range 14 East of the 6th P. M., in Otoe County, although it includes some land in Sections 4, 8, and 9 of

the same township and range where they lie adjacent to or corner on Section 5.

After judgment had been rendered by the trial court in favor of the plaintiffs, the defendants above referred to filed a motion for new trial and took this appeal from the overruling thereof.

George H. McNair was made a party defendant but no service was ever obtained on him; consequently, the appellees asked for and were granted leave to dismiss the action as to him, and did so. We shall not again refer to McNair in this opinion.

The judgment rendered by the trial court, which dismissed appellants' cross-petition for want of equity, denied appellants any right in and to that part of these lands which they claimed by adverse possession and also under certain quitclaim deeds.

The first question raised relates to the sufficiency of the evidence adduced by appellees to sustain the trial court's decree in their favor, which is based on adverse possession. Adverse possession is complete when, as stated in Frank v. Smith, 138 Neb. 382, 293 N. W. 329, 134 A. L. R. 458: " 'The title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continued, notorious, and adverse possession thereof, claiming title to the same against all persons, for ten years.' Lantry v. Wolff, 49 Neb. 374, 68 N. W. 494."

Since this is an equitable action it will be reviewed here de novo. However, in view of the record, which discloses that the trial court viewed the entire premises, we think the following principles have particular application:

" 'While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue,

consider the fact that the trial court observed the witnesses and their manner of testifying.' Gentry v. Burge, 129 Neb. 493, 261 N. W. 854." Higgins v. Adelson, 131 Neb. 820, 270 N. W. 502.

"This court has held that, when the court views the topography of a certain locality, its findings are entitled to great weight." Independent Stock Farm v. Stevens, 128 Neb. 619, 259 N. W. 647.

The evidence is in irreconcilable conflict on many material matters. We have come to the conclusion that appellees' version of what happened is correct, so will set forth the facts accordingly as it would serve no useful purpose to set out appellants' evidence that is in conflict therewith. We can only say we think appellants, and some of their witnesses, were either mistaken as to what they testified to in regard to certain material matters or otherwise misrepresented the facts as they relate thereto.

In 1856 the United States government surveyed Section 5, which became a part of Otoe County. At that time the Missouri River cut across the section from northeast to southwest, and this created many irregular tracts which were identified as Government Lots. The area left in what would have been the south half of the northeast quarter was identified as Government Lot 6, the area left in what would have been the north half of the southwest quarter was identified as Government Lot 7, and the area left in what would have been the south half of the southwest quarter was identified as Government Lot 8. Section 5 apparently remained in this condition until 1911. Then the river started cutting toward the west. It continued to do so until about 1920. At that time it had washed away all of Section 5 except a small tract in the extreme northwest corner thereof and possibly a small area on the western edge of Government Lot 7 or the north half of the southwest quarter.

Insofar as the record shows, and is here material, at the

time this change in the course of the river took place George S. Upton owned Government Lot 7, Lot 4 in Government Lot 6, Lots 7, 8, and 10 in Government Lot 5, and Lot 6 in Government Lot 3; Charles Boardman apparently owned Government Lot 8; appellees' father owned a 20-acre tract in the northwest quarter, apparently being Lot 5 of Government Lot 3 or the north half of the northeast quarter of the northwest quarter; and Caleb Eaton's father owned land in the northeast quarter and, also, land in Cass County lying immediately adjacent thereto on the north. The latter was also washed away between 1911 and 1920.

Shortly after 1920 bars began to form in the river where this land had washed away. By 1928 the bars had formed considerable of an island, with the main channel of the river to the east thereof. However, a chute some 300 to 400 feet wide remained on the west side of the island or between it and the west bank. A considerable area had built back in between the west line of Section 5 and the west bank of this chute before the island formed.

In 1928 Caleb Eaton moved onto the north end of this island, occupying it as far south as the east-west center line of Section 5 if extended east across the chute to the river. He built a home on the island north of the section or county line. Medford James, no relation of the appellees, moved onto the island in 1929 and occupied land lying south of the east-west center line of Section 5 if extended east across the chute to the river. He built a cabin on the land he occupied in 1930 and moved his family into it in 1931, that being the first year he raised a crop. About 3 years later he built a 4-room tile house for his family. He occupied the island as far south as a division fence which he and Charles Boardman built about 1934. This is the present south line of the land claimed by appellees. Medford James cleared about 60 acres on the land he claimed, which extended east from the chute to the river and north from the

division fence, which he and Boardman built, to the half section line. He stayed on the land until he sold it in 1938. Appellees went on the island in 1931 and cut some cottonwoods for use as lumber. They did so in both 1931 and 1932. They occupied an area south of the tract their parents had owned before it washed away. In 1933 they started a garden on it. Later about 40 acres were fenced. They have always continued to occupy and farm it, being land east of the chute, west of the land occupied by Raymond Kinnison and Riley Eaton, and continuous south as far as the land occupied by Medford James. Raymond Kinnison, a nephew of Caleb Eaton, moved onto the island in 1932 and occupied a strip some 37 rods wide just north of that occupied by Medford James. He did so pursuant to an agreement with Caleb Eaton. Kinnison moved onto this land with his family in 1932 and cleared about 21 or 22 acres the following year. He continued to farm it until he sold it in 1938. At that time he had cleared about 56 acres thereof. Riley Eaton, a brother of Caleb Eaton, moved onto the land just north of Raymond Kinnison shortly after the latter came onto the island. Riley did so pursuant to an agreement with Caleb Eaton. He occupied a strip about 60 rods wide and claimed it from the chute east to the river. He continued to farm it until he sold it in 1941.

Due to the fact that he lost most or all of his crop in the years 1936, 1937, and 1938 as a result of floods, Medford James sold his interest in the land he was occupying to Edwin Moran, Wilber Fey, and appellee Vantine A. James. The deed was executed on August 10, 1938. On November 21, 1938, Raymond Kinnison sold his interest in the land he was occupying to the same grantees. Thereafter, on December 8, 1938, Edwin Moran conveyed his interest in the foregoing lands to appellee John W. James. Wilber Fey and appellee Vantine A. James, in the fall of 1938, put in a wheat crop on the lands they had acquired from Medford James

and Raymond Kinnison. However, it was destroyed by a flood in the spring of 1939. As a result Wilber Fey deeded his interest in the foregoing lands to appellees. The appellees also acquired the interest of Riley Eaton by deed executed April 10, 1941. The appellees put in wheat on the land they then owned in the fall of 1939, 1940, 1941, 1942, 1943, and 1944. However, due to floods, they never harvested a crop. It should here be stated that appellants worked for appellees on this island during some of these years, helping clear land, prepare it for crops, and put in crops. They were paid for doing it. During this time they made no claim of ownership but recognized that of appellees, in fact, they rented some of it from appellees in 1940 and 1941 and put in corn but only raised a crop in 1940.

As a result of these continued years of crop losses, due to floods, appellees, beginning with 1945, decided to let the cleared land grow back to weeds, willows, and other vegetation in the hope that it would cause silt to deposit thereon during flood stages of the river and thus build it up above the ordinary flood stage. To assist this plan they killed the willows on their lands in 1948 by spraying them, doing so in order to develop a denser growth of vegetation. Nothing further happened until 1951 when the appellants had a survey made and thereafter started to clear part of the island claimed by appellees. When, in 1952, they rented this cleared area to Wilber Fey and he informed appellees of that fact, the background for this litigation started. Appellees advised appellants of their claimed rights and when appellants would not respect them appellees instituted this action. It was started on December 11, 1954.

We said in Frank v. Smith, *supra*, that: " 'Where the water of a river gradually recedes, changing the channel of the stream and leaving the land dry which was theretofore covered by water, such land belongs to the riparian proprietor.' Topping v. Cohn, 71 Neb. 559, 99 N.

W. 372; followed in Conkey v. Knudsen, 135 Neb. 890, 284 N. W. 737." However, title to an island may be acquired by adverse possession. See, Briard v. Hashberger, 107 Neb. 199, 185 N. W. 430. In regard to what constitutes adverse possession we said in Lantry v. Parker, 37 Neb. 353, 55 N. W. 962: "The law does not require that possession shall be evidenced by a complete enclosure, nor by persons remaining continuously upon the land, and constantly from day to day performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be in its nature adapted." We think the evidence adduced by appellees discloses that they and their predecessors in title have, for more than 10 years, maintained such an actual, continued, open, and exclusive possession of the land they are now claiming that they are entitled to have their title thereto quieted and confirmed. In this respect we have not overlooked the fact that appellants, and their predecessors in title, paid taxes on part of this land over a period of years, as did appellees. Such payment, while indicative of a claim of ownership, does not overcome the actual ownership of appellees obtained by adverse possession. As to the effect thereof see Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 331.

But appellants contend appellees are estopped from asserting the claim they here make because of their relationship to appellants in connection with the interests appellants acquired from Charles Boardman in 1940 and from the George S. Upton heirs in 1949. Their contention is based on the claim that when a client engages an attorney to transact some legal business for him the attorney cannot remain silent, when he has a duty to speak, and thereafter claim as his own properties which were the subject of his employment, for to permit him to do so would be a constructive fraud upon the client.

We have said in regard to the latter that:

" 'Constructive or legal fraud may be found from the relation of the parties to a transaction, or from circum-

stances and surroundings under which it takes place. The conscience is not necessarily affected by it, and it may exist without any fraudulent intent. * * *' Lake Hiawatha Park Assn. v. Knox County Agricultural Society, 28 Ohio App. 289, 162 N. E. 653." Johnson v. Radio Station WOW, 144 Neb. 406, 13 N. W. 2d 556.

In Taxpayers' League v. Wightman, 139 Neb. 212, 296 N. W. 886, we held: " 'Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud-feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud.' 26 C. J. 1061."

We have often set forth the duty of an attorney to his client. In this respect the Canons of Professional Ethics of the American Bar Association have, by official adoption, become the canons of ethics for the bar of this state. See Rules of the Supreme Court, Integration of the Bar, Article X.

Canon 6 of the foregoing provides in part: "It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel."

We held in Nebraska Power Co. v. Koenig, 93 Neb. 68, 139 N. W. 839, quoting from Wright v. Smith, 23 N. J. Eq. 106, that: " 'Every man has a trust to whom a business is committed by another. Every man is a trustee whose office is to advise or to operate, not for himself, but for others.' " We then went on to say: "The rules of equity which determine the consequences of acts performed by a fiduciary are not restricted to attorney and client, nor to similar conventional relations, but extend to all cases, where, on one hand, confidence is properly reposed, and, on the other, knowledge or

authority or influence arises from any cause. * * * A person gratuitously or officiously assuming as agent or trustee to control or manage the property or interests of another is as firmly bound by the implied terms of his confidential relation as one who is regularly employed and paid."

However, as stated in Petraborg v. Zontelli, 217 Minn. 536, 15 N. W. 2d 174: "The relation between an attorney and his client is one of highest trust and confidence, requiring the attorney to observe the utmost good faith and not to allow his private interests to conflict with those of his client. In re Estate of Lee, 214 Minn. 448, 9 N. W. (2d) 245. But where an attorney upon his employment makes full and frank disclosure as to his interests in the property involved in the subject matter of the retainer and the client desires the services of the attorney despite such interest and with full knowledge thereof, the attorney, under such circumstances, has the right to deal as he chooses with his own property. It is only when he has not advised his client of all the facts concerning his interest in the subject matter of the retainer or litigation that the court will closely scrutinize the transaction so as not to permit him to take advantage of his professional relationship in dealing with his client." The same would be true of an agent. See, Schultz v. Bleckwehl, 135 Neb. 94, 280 N. W. 257; In re Estate of Wiley, 150 Neb. 898, 36 N. W. 2d 483. As stated in In re Estate of Wiley, *supra:* "A fiduciary seeking to profit by a transaction with the one who confided in him has the burden of showing that he communicated to the other, not only the fact of his interest in the transaction, but all information he had which it was important for the other to know in order to enable him to judge of the value of his property."

The general rule is that in order to create an estoppel it is essential that the party against whom the estoppel is claimed acted with knowledge of the facts and asserted particular rights inconsistent with those subse-

quently claimed, and that the party claiming estoppel, being without knowledge or means of knowledge of the facts, was influenced by and relied upon the conduct of the person sought to be estopped, and changed his position in reliance thereon or acted upon it to his injury or prejudice. Sedlak v. Duda, 144 Neb. 567, 13 N. W. 2d 892, 154 A. L. R. 490; State ex rel. Truax v. Burrows, 136 Neb. 691, 287 N. W. 178; Peters Trust Co. v. Cranmore, 114 Neb. 491, 208 N. W. 635; Walker v. Ehresman, 79 Neb. 775, 113 N. W. 218.

And in Olds v. Hitzemann, 220 Ind. 300, 42 N. E. 2d 35, it was stated that: " 'The rule requiring the attorney to establish the fairness and honesty of the transaction does not apply where the attorney has openly assumed an attitude hostile to the client, before the transaction was entered into, so that thereafter the parties are put at arm's length and the client could not possibly have been acting under the influence of the confidence which he had reposed in the attorney.' 7 C. J. S., § 127(b), Attorney and Client, p. 967."

The record discloses that when appellees and appellants were boys their families were neighbors living on farms located near Nebraska City and they grew up as close friends. Appellee Vantine A. James was licensed to practice law in this state in 1932 and thereafter did so at Nebraska City. As such he became appellants' legal adviser on many matters, they usually going to him for advice. On the other hand appellants did a great deal of work for appellees in many different places and of many different kinds, including the work hereinbefore referred to which appellants performed for appellees on the island.

In 1940 the appellants, by quitclaim deed from Charles and Rachael Boardman, husband and wife, dated April 23, 1940, acquired whatever interest the Boardmans then had in and to about the south 93 rods of the land which the appellees now claim to own on the island. Because of appellee Vantine A. James' connection with this mat-

ter appellants contend appellees are now estopped from making any claim thereto for, to permit them to do so under the circumstances shown by the record, would be a fraud upon appellants. In connection with discussing this transaction we shall refer to appellee Vantine A. James as James.

The record shows that in the early spring of 1940 Charles Boardman came to the office of James in Nebraska City; that he told James he wanted to sell him whatever land he owned on the island south of the division fence; that James advised appellants of Boardman's desire, appellants having previously expressed to James a desire to acquire some land on the island; that James told appellants he would step aside if they wanted it; that appellants and James went out and inspected the land, James showing appellants the division fence to which he advised appellants appellees claimed to own the land on the island; that both James and appellants, because of the nature of the terrain, were mistaken as to where the north line of the Boardman land was located and consequently none of them were aware of the fact that the description in the deed by which appellants subsequently acquired Boardmans' interest covered part of the land which the appellees claimed to own; that James closed the deal, taking the deed already referred to in the name of the appellants and paying the Boardmans the agreed consideration of $250; that James had the deed recorded; and that appellants repaid the consideration. From that time on until 1951 all parties recognized the line between their lands as this division fence which had been built by Medford James and Charles Boardman about 1934, although appellants contend they did not know of the mistake made until about 1952 when they were advised thereof by their then counsel. In Schultz v. Bleckwehl, *supra,* we said: " 'Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent

by the other so to act.' Restatement, Agency, sec. 1."

We do not think the relationship of appellants and James in connection with this transaction was that of attorney and client but rather that of a gratuitous agent; however, the duty would be the same. We think James made a full and frank disclosure to the appellants as to the interests appellees claimed in the land involved, although there was a mutual mistake in relation to what area the description in the deed would cover. However, all parties recognized what they considered to be the other's rights in this area for over 10 years. Under such circumstances we do not think estoppel arises, nor do we think appellants were defrauded for they got exactly what they thought they were getting when they went out and looked at the land and saw where the division line was located.

"* * * it is the established rule in this state that, when a fence is constructed as a boundary line fence between two properties, and where the parties claim ownership of the land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly inclosed with their own. Carnahan v. Cummings, ante p. 337; Krumm v. Pillard, 104 Neb. 335; Zweiner v. Vest, 96 Neb. 399; Andrews v. Hastings, 85 Neb. 548." Pfeifer v. Scottsbluff Mortgage & Loan Co., 105 Neb. 621, 181 N. W. 533. See, also, Hallowell v. Borchers, 150 Neb. 322, 34 N. W. 2d 404.

As held in Purdum v. Sherman, *supra*: "Where one by mistake as to the true boundary line enters upon and takes possession of lands of another, claiming it as his own to a definite and certain boundary, by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession."

With reference to the 1947 deed, which appellants obtained from the Boardmans, we do not think either of

the appellees was connected with this transaction in such a manner as to create any fiduciary relationship between the parties. It is true that appellee Vantine A. James drew the contract and prepared the deed but he did not put a description in either instrument. When and by whom the description of the land conveyed thereby was put in the deed is not too clearly shown. It was apparently done by the party who closed the deal. Under the circumstances disclosed by the record, as they relate to this transaction, we do not think appellants gained any rights in and to the lands herein involved by reason thereof.

We have already referred to the land in Section 5 that was owned by George S. Upton prior to its being washed away. George S. Upton died on March 4, 1934, and his wife in 1944. During September and October of 1949 appellants bought from the heirs of George S. Upton whatever interests they had in and to this land. It is contended that appellee Vantine A. James handled this transaction for the appellants. We do not think the record shows that he did. However, let us assume that he did. We do not think that would help appellants. Prior to their purchasing the Uptons' interests the appellants advised appellee Vantine A. James of the fact they intended to do so, stating the Uptons claimed they owned lands east of the chute. On at least two occasions, prior to their purchase of the Uptons' interests, appellee Vantine A. James advised appellants that the Uptons had no rights east of the chute as that land belonged to appellees. Under this situation we do not think appellants are in a position to claim anything by estoppel by reason of their subsequent purchase. All they got was what the Uptons had and that was land west of the chute.

In view of what we have said we will not discuss such matters as the claimed settlement agreements of 1952 and 1953; admissions made by the appellants to employees of the Hart Construction Company; and appel-

lants' endeavors to purchase the land from appellees. To do so would serve no useful purpose. Our findings fully support the judgment of the trial court. It is therefore affirmed.

AFFIRMED.

CLIFTON BRYANT, APPELLANT, V. EDMOND E. GREENE, APPELLEE.

81 N. W. 2d 580

Filed March 8, 1957. No. 34032.

1. **Appeal and Error.** Where it appears that a judgment of affirmance was entered on the basis of there being no properly authenticated bill of exceptions, and it further appears that upon the filing of a supplemental transcript the bill was in fact properly obtained and settled, this court will, if timely application be made accompanied by a proper showing, vacate the judgment of affirmance and permit a correction of the defective record.
2. ———. In an appeal from an order directing a verdict and dismissing an action, the party against whom the verdict was directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
3. **Release.** When the amount received for a release of liability is grossly inadequate to compensate for the injuries sustained, that fact may be considered, with the other evidence and circumstances in the case, as tending to show that the party executing the release was overreached and that the minds of the parties never met in the consummation of a valid agreement.
4. **Release: Fraud.** Where a party suffered injuries clearly in excess of any that were contemplated by the parties when a settlement and release of liability were made, it is evidence that may properly be considered, along with the other evidence and circumstances in the case, in determining the question of fraud and misrepresentation in the procurement of the settlement and release.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, JUDGE. *Reversed and remanded.*

Alfred A. Fiedler and *Ira Epstien*, for appellant.

Robinson, Hruska, Crawford, Garvey & Nye, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

Plaintiff brought this action to recover damages for personal injuries received when he was struck by the automobile of the defendant on a pedestrian cross walk in the city of Omaha. The trial court sustained a motion for a directed verdict at the close of plaintiff's evidence and the plaintiff appealed.

A former opinion in the case disposed of the appeal on the basis of a failure to procure a bill of exceptions properly authenticated as required by statute and the rules of this court. Bryant v. Greene, 163 Neb. 497, 80 N. W. 2d 137. This court by order after a proper showing permitted the filing of a supplemental transcript establishing that an extension of time for the preparation of the bill of exceptions was actually procured and that the bill of exceptions was in fact a proper one for the consideration of this court. We hereby vacate the affirmance of the judgment heretofore entered and will now determine the appeal on the record presently before the court. The rule in such cases is: Where it appears that a judgment of affirmance was entered on the basis of there being no properly authenticated bill of exceptions, and it further appears upon the filing of a supplemental transcript that the bill was in fact properly obtained and settled, this court will, if timely application be made accompanied by a proper showing, vacate the judgment of affirmance and permit a correction of the defective record. See Dobesh v. Associated Asphalt Contractors, 137 Neb. 342, 289 N. W. 369.

The petition alleges that plaintiff, on May 27, 1954, while crossing a street intersection at Twenty-eighth and Q Streets in Omaha, was negligently struck and injured by defendant's car while he was operating his

automobile at that point. The answer alleges that the accident resulted from the negligence of the plaintiff and, further, that plaintiff had accepted a settlement of his claim and released the defendant from liability. The plaintiff in his reply alleged that the release was procured by misrepresentation and fraud, and that the purported settlement was inadequate as compensation for the injuries sustained.

Under the state of the record, the question of the negligence of the defendant and the contributory negligence of the plaintiff was a question for the jury. It is not contended otherwise and we shall not further consider this question. The issue here involved is whether or not the trial court correctly determined that there was insufficient evidence for the jury on the question of misrepresentation and fraud in the procurement of the settlement and written release.

The evidence shows that plaintiff was an employee in a meat packing plant. He left the plant about 4:20 p.m. He stopped at the northeast corner of the intersection of Twenty-eighth and Q streets and when the traffic light turned green, he started south across Q Street at the cross walk on the east side of the intersection. When he was within approximately 6 feet of the south curb of Q Street he was struck by defendant's automobile as it was making a right turn from Twenty-eighth Street onto Q Street. Defendant did not stop but reported to a policeman about 2 blocks away that he thought he had hit a pedestrian at about Twenty-eighth Street. The defendant was later arrested on the charge of leaving the scene of an accident contrary to the provisions of section 39-762, R. R. S. 1943. The plaintiff also stated that he was arrested and required to give bond. The basis of plaintiff's arrest is not shown by the record. Plaintiff testified that the accident occurred on a Thursday and that he lost 2 days' work before the settlement was made and the written release executed on June 12,

1954. He had also incurred hospital and medical expenses prior to that time.

On June 12, 1954, plaintiff went to the office of a representative of defendant's insurance carrier. Plaintiff's evidence is that he was informed that he would be reimbursed for the 2 days' pay which he had lost and for his hospital and medical expenses up to that time. He was given $34 for the 2 days' employment and he was required to endorse a check in the amount of $27.65 to the Nebraska Methodist Hospital for services rendered on May 28 and 29, 1954. Other hospital and medical bills were not paid at the time of trial.

Plaintiff was 26 years of age. He had finished his schooling at the age of 13 years and had worked since at common labor. He testified that he had never been arrested previously. He testified further that the representative of the insurance carrier told him that he was in trouble with a "bunch of cops," that he would be paid for the 2 days he lost from his work and all the hospital bills, and that he would not have to worry about going to jail. He said he asked about payment for his injuries and the representative of the insurance carrier said that "it would just only take care of the hospital bills and for the two days I missed work, $34."

In an appeal from an order directing a verdict and dismissing an action, the party against whom the verdict was directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466; Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569.

Applying this rule, it appears that the representative of the insurance carrier represented to the plaintiff that all he was entitled to was compensation for 2 days' pay and the hospital bills that had been incurred. The representative of the insurance carrier in effect told him he had nothing coming for any injuries he had sustained.

The evidence also shows that the representative of the insurance carrier told plaintiff that he was in trouble with the police and that the payment of the amounts agreed upon would relieve him of his worry about going to jail. The record shows that plaintiff was concerned about his arrest and a fear that he might go to jail, matters that had no relation whatever to the insurance carrier's liability to him.

The evidence shows that plaintiff's injuries included an injury to his right hand, a severe contusion of the lumbar area of his back, and a bruising of his muscles and other soft tissues. The injuries sustained were greatly in excess of the amount of the settlement, in fact the settlement allowed nothing for these injuries. This is a fact properly to be considered in determining if the plaintiff had been overreached when he was induced to accept the settlement and sign the written release. The rule is: When the amount received in settlement is grossly inadequate to compensate for the injuries sustained, that fact may be considered, with the other evidence and circumstances shown, as tending to show unfair practice, that the party had been overreached, and that the minds of the parties had never met in the consummation of a valid agreement. Collins v. Hughes & Riddle, 134 Neb. 380, 278 N. W. 888; Baumann v. Hutchinson, 124 Neb. 188, 245 N. W. 596.

The plaintiff was a common laborer without experience in matters of this kind. The representative of the insurance carrier was experienced in this field and used his knowledge of the legal liabilities involved and plaintiff's fear of police entanglements to induce an unjust and unfair settlement and release. Plaintiff's injuries were so serious, according to the undisputed evidence, and so disproportionate to the amount actually paid as compensation therefor, as to clearly support an inference of fraud. It is clear also that plaintiff had suffered injuries clearly in excess of any that were contemplated by the parties when the settlement and release were made.

This is evidence which likewise may be considered, along with the other evidence and circumstances, even though it is more in the nature of mutual mistake, but which in proper cases has been held to be a valid ground for setting aside such a settlement. Simpson v. Omaha & C. B. St. Ry. Co., 107 Neb. 779, 186 N. W. 1001.

Upon a consideration of the evidence and the surrounding circumstances, together with the reasonable inferences to be drawn therefrom, we conclude that the evidence was sufficient for consideration by a jury to determine if the settlement and release were obtained by misrepresentation and fraud. The trial court was therefore in error in directing a verdict for the defendant at the close of plaintiff's case on this issue. The judgment is reversed and the cause remanded for a new trial in accordance with the views expressed in this opinion.

REVERSED AND REMANDED.

JULIA FIALA, BY MARY RERUCHA AND VICTORIA BRUNER, AS HER NEXT FRIENDS, ET AL., APPELLANTS, V JOHN G. TOMEK ET AL., APPELLEES.
81 N. W. 2d 691

Filed March 8, 1957. No. 34061.

1. **Equity.** An equity court obtaining jurisdiction of a cause for any purpose will retain it for all purposes and proceed to final determination of all matters in issue thus avoiding unnecessary litigation.
2. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
3. **Insane Persons.** Where a person is not actually insane, but is incapable, through age or weakness of mind, of conducting his affairs, a suit may be maintained in his behalf by his next

friend, and it is within the discretion of the court to allow a suit so instituted to proceed.

4. ———. In general, any proof that is material and relevant to the issue of sanity or competency may be admitted upon the trial of such issue.

5. ———. In the determination of the mental condition of a person, his conversation, acts, declarations, and conduct in general may be shown at the trial, upon the theory that such proof is frequently decisive upon the question of competency or incompetency.

6. ———. The physical condition of a person alleged to be incompetent may be considered only insofar as it affects his mental condition.

7. Actions. An action may be maintained by the next friend when the person in whose behalf the action is commenced is not insane but incapable of managing his affairs, has not been adjudged to be incompetent, and has no appointed guardian.

APPEAL from the district court for Butler County: H. EMERSON KOKJER, JUDGE. *Affirmed.*

Russell A. Souchek and *E. A. Coufal,* for appellants.

Bryant & Christensen and *Tomek & Tomek,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action brought in the district court for Butler County by Julia Fiala, a widow, by her next friends Mary Rerucha and Victoria Bruner, two of her daughters, and Mary Rerucha, Victoria Bruner, Martha Bruner, Helen Leet, and Lucile Fiala Wynn, her daughters, as plaintiffs, against the five sons of Julia Fiala, Frank Fiala, John Fiala, Raymond Fiala, Charles Fiala, and Joseph Fiala and their wives who need not be named. There are other parties made defendants who, for the purposes of this appeal, need not be considered. The purpose of the action was to have the court find and render judgment canceling the conveyance of the plaintiffs' interests in certain land located in Butler

County and to quiet title thereto in the plaintiffs; to have the court find and render judgment in favor of Julia Fiala to have an interest in the proceeds of the sale of certain land commensurate with her rights; and to require the defendant sons of Julia Fiala, as agents who shared in the rentals of all the land in question, to account for the same. The judgment of the trial court was generally in favor of the defendants, adjudging that the conveyance of plaintiffs' interests in certain lands described in the pleadings be not set aside or the title quieted in the plaintiffs, and that the accounting be reserved to be determined in the future, dependent upon the decision of this court as hereinafter appears. From the order overruling the motion for new trial, the plaintiffs have appealed to this court.

On November 8, 1955, the plaintiffs filed their second amended petition alleging in substance that the plaintiff, Julia Fiala, by reason of old age, weakness of mind, and undue and undeserved credulity and reliance upon her sons, was incapable, unassisted and independently, of conducting her own affairs and by reason of her condition was liable to be deceived or imposed upon by deceiving, artful, or designing persons and could not properly take care of and manage herself and her property; that this action was therefore brought by Mary Rerucha and Victoria Bruner as the next friends of Julia Fiala; and that no guardian had been appointed for Julia Fiala. The pleadings admitted that prior to his death in 1936, Frank J. Fiala and Julia Fiala were husband and wife, and during their marriage relationship there was born to them ten children, all of whom have been previously named.

The pleadings also admitted that Frank J. Fiala died intestate owning certain lands located in Butler County which are described in the petition; that Julia Fiala was vested with the homestead right for the term of her life in certain described land; that she was entitled to an undivided one-third interest in all the land; and that

the children were entitled each to a one-fifteenth interest in all the land.

The pleadings admit the execution of a life lease pleaded in the plaintiffs' second amended petition, recorded in book 4 of the lease and contract record in the office of the county clerk of Butler County. The pleadings further admit that there was a sale of a part of the land, and a stipulation was entered into relative to that transaction.

The plaintiffs' second amended petition alleged that after the death of her husband and prior to November 6, 1936, the sons of Julia Fiala conceived the plan and purpose of obtaining a conveyance of the interests of the daughters for a nominal consideration, and obtaining a conveyance of the interest of Julia Fiala by fraudulently representing to her and her daughters that the sons would farm the lands of which Frank J. Fiala died seized, raise crops thereon, and pay to Julia Fiala annually two-fifths of all the crops raised to be delivered by them to market, and the customary cash rent for the pasture and hay land; that the sons then and at that time did not intend to fulfill such promise but planned and intended to allow to her from the proceeds of such crops a meager and inadequate amount for the necessaries of life and to use and appropriate the remainder, other than necessary to pay taxes, to their own use; and that Julia Fiala relied upon and believed in such representations. It was further alleged that on November 6, 1936, Julia Fiala, on the basis of said fraudulent representations, executed a conveyance of said lands of which Frank J. Fiala died seized to the ten children in equal shares; that pursuant to said plan and purpose, the sons procured a conveyance from their sisters for a nominal and insubstantial consideration, but before the sons obtained the same the daughters insisted the obligation of the sons to provide and pay said income be set up in written form, and to that end they required an agreement of the daughters and the sons be executed

and delivered to the mother providing for her receiving said income, and to that end there was executed by the sons and their wives and by the daughters a life lease; and that after the life lease had been prepared and delivered to the mother, on January 27, 1936, the daughters, for a consideration, conveyed their interests, subject to the life lease agreement, to the sons of Julia Fiala in equal shares.

The plaintiffs further alleged that the son Frank V. Fiala farmed the lands in Section 29 from the year 1937 through the year 1952; that the land was productive and Frank V. Fiala realized and raised good crops thereon, sold a portion that he elected to allot to his mother as her share of the crop, and deposited the proceeds to her credit in a bank; and that in the period he farmed the land from 1942 until 1952, he represented to his mother that he had deposited the proceeds of her full share of the crop and the cash rental but, as a matter of fact, he did not account for the full share of the crop she was entitled to receive. The petition further alleged that Frank V. Fiala used the funds he deposited in his mother's account for his own purposes in buying material for and constructing building improvements and other improvements to his benefit and to the benefit of the owners of the land; and that the average yearly fund, for the years 1942 to 1952 inclusive, to maintain a home and provide for the support and maintenance of the mother did not exceed $300.

The petition also contained an allegation that the sons John, Joseph, and Charles farmed the land in Section 33 for the years 1942 to 1952, inclusive, and agreed to pay a crop rental of two-fifths of the crops raised on the land delivered at the market and cash rental for the pasture and hay land; that they failed to pay cash rent, and accounted for only a portion of the crops which under the terms of the tenancy were to be delivered at the market for their mother; that they drew funds from their mother's account for their own use; that their

mother left all of the accounting and withdrawal of funds to her sons which enabled them by fraud, deceit, and misrepresentation to keep her uninformed as to the nature of the transactions; that the terms and conditions of the life lease had been broken and violated by the defendants; and that the plaintiffs were entitled to the cancellation of the said deeds executed by them pursuant to the lease and contract, and restoration to them of the land conveyed by them to defendants, or to the proceeds of the sale of the land.

The plaintiffs prayed that the conveyance of their interests in all of the real estate be canceled as to the land in Section 29, and title thereto be quieted in them; that Julia Fiala be decreed to have an interest in the proceeds of the sale of the land in Section 33 commensurate with her rights in said premises; and that the sons who shared the rentals as above alleged be required to account for the same.

The defendant sons and their wives, except Joseph and his wife, in their separate answer to the second amended petition alleged that all the matters of rentals and management of the lands described in plaintiffs' second amended petition occurred and arose prior to March 1, 1949, and any right to rentals and accounting due, or alleged to be due, Julia Fiala prior to said date were barred by the statute of limitations; that more than 4 years had elapsed since the accrual of the cause, or causes, of action, if any, of Julia Fiala; that more than 5 years had elapsed since the recording of the deed, and the cause of action, if any, accruing to Julia Fiala to cancel the deed was barred by the statute of limitations; and that Julia Fiala had filed a dismissal of the above-entitled action, and no further proceedings should he had in the cause and the action should stand dismissed. They prayed that the dismissal of Julia Fiala, as filed, be sustained; that plaintiffs' second amended petition be dismissed; and that said defendants recover their costs expended.

The plaintiffs' reply contained a general denial of all matters pleaded in the answers except those therein admitting certain allegations of the plaintiffs' second amended petition; alleged that a motion filed by the defendants to dismiss these proceedings by reason of the dismissal filed by Julia Fiala was overruled by the district court and without prejudice to said ruling and without waiving the same alleged that the dismissal of Julia Fiala was obtained by the defendants, or some of them, by fraud and misrepresentation; and renewed the prayer of the petition for cancellation of the instrument and for an accounting against the defendants.

The record discloses that Frank V. Fiala was called as a witness by the plaintiffs with reference to the issue involving an accounting. His examination proceeded with a few questions when counsel for the defendants interposed an objection on the part of all the defendants except Joseph Fiala and his wife to the following effect: That no further proceedings in the matter be had for the reason that the same stands dismissed of record in this court. The court said: "I think I will take that motion under advisement and determine that along with the matters of the case, unless it appears I can rule on it at an earlier time. I think there has been no showing or evidence in connection that there was a dismissal and there was a motion to have the dismissal disregarded or dismissed and there has been no evidence one way or the other on that, as I recall."

Defendants' counsel then made a motion on behalf of the same defendants that no further proceedings be had in the matter for the reason that the action was brought by Mrs. Bruner and Mrs. Rerucha in behalf of Julia Fiala, they being daughters and merely heirs apparent, and the action was not brought by the real party in interest. This motion was taken under advisement by the court.

After a few more questions were propounded to the witness, the defendants objected to the line of question-

ing having to do with the accounting for the same reasons as heretofore stated. There was some discussion between counsel for plaintiffs and the court. The court stated: "Well, if this evidence is going to an accounting I think it is coming at the wrong time; and objection is sustained. * * * if the case has been properly dismissed by the party entitled, or, if she is the real party in interest and competent to bring the action and has not brought it herself, those questions might dispose of the case without even going into the accounting; * * *."

After the court ruled, one of counsel for the plaintiffs made an extended statement which included this declaration: "Well, at the present time I want to show, with the case now at issue on the cancellation as well as the accounting, I want to show the fact that this gentleman (Frank V. Fiala) was during this period of time an agent and managed and cared for the affairs of the real party in interest."

The court responded that he wanted counsel to have an opportunity to present his case in full, everything that was in the petition, if he would get at it in the proper order. The right of the daughters to bring the action as next friends was raised by motion. The court said he felt the motion was good. The court said: "I overruled the motion and now it is your duty to prove that these daughters have the right to bring this action as the next friend of the mother. They are not the real parties in interest and under the statute the action must be brought by the real party in interest. Now it's possible * * * you can make a showing in the evidence that they are authorized to bring this action as next friend of the mother; * * *." The case proceeded to trial, and at the close of the evidence counsel for the defendants made a motion in behalf of the same defendants to dismiss the second amended petition and reply filed therein. The reasons therefor are contained in the trial court's order

dated April 12, 1956, which will be referred to later in the opinion.

The court, on December 22, 1955, rendered the following order: "Trial resumed at 9:30 A. M. pursuant to adjournment. Plaintiff introduces additional evidence and rests as to the phase of the case being tried which is the right of the named next friends to bring the action for Julia Fiala. Defendants adduce evidence on the phase of the case now being tried and rest. Defendants move for a dismissal on grounds stated in record. The motion is argued by counsel for both sides. At 3:45 P.M. the motion is sustained but jurisdiction is retained to try the issues in the case which have not been tried in case this decision is later reversed by the Supreme Court."

The plaintiffs filed a motion for new trial, and upon due consideration thereof, the court entered an order reinstating the case for trial. This order was made April 12, 1956, as follows:

"Pursuant to a suggestion by the Court this cause proceeded to trial upon questions raised by the pleadings other than the question of accounting. At the end of the evidence upon the issues so tried the defendants moved for a dismissal of plaintiffs' petition on the grounds, first, that the action was not brought by the real party in interest and that there was an insufficient showing to sustain the right of the two daughters of Julia Fiala to bring the action as her next friend; second, that there is a presumption that Julia Fiala was competent to execute the dismissal of the suit received in evidence as Exhibit 2; and third, that in view of Exhibit 6, by which Joseph Fiala and Frank Fiala were appointed agents to collect the rents for Julia Fiala, the case could not be maintained in any event except as against the agents for an accounting as to rents collected or for failure to collect rents.

"The motion was sustained and the case dismissed. A motion for new trial was filed, argued and submitted.

"In considering the motion for a new trial the evi-

dence has been reviewed and the Court finds that:

"1. Julia Fiala is not insane, but she is of advanced age and there is evidence of her lack of ability at this time to adequately represent herself. * * * The Court was in error in dismissing the action completely, and it should be reinstated to the extent hereinafter provided.

"2. Upon the evidence in the record it appears that Exhibit 2 (the dismissal of the action) was executed by Julia Fiala under a mistake of fact and it should not be recognized as a valid dismissal of the action.

"3. There is no evidence of fraud in the execution and delivery of the deeds, Exhibits 8 and 9, and the life lease, Exhibit 10. On the contrary, it appears that these instruments recognized and carried into effect a plan that had been proposed by Frank J. Fiala before his death whereby the sons would get the real estate and those daughters then unmarried would receive furniture and furnishings or money in lieu thereof to equal the value of the furniture and furnishings which had been given to the other daughters upon their marriage. It was a plan customary among such families. It was worked out with the advice and assistance of a competent attorney, who appears to have represented all the parties as a family, and it was approved by all of them. Had the plan not been acceptable it would undoubtedly have been questioned before the passage of seventeen years. All of the children, both sons and daughters, had a duty and a responsibility so far as Exhibits 8, 9 and 10 are concerned to see that Julia Fiala received the rents and profits from the land during her lifetime. By Exhibit Number 6 the duty of managing the land, collecting rents, paying taxes, paying insurance on the buildings and keeping them in repair devolved upon Joseph Fiala and Frank Fiala. The issue as to whether or not they have fulfilled their duties as agents and collected and accounted for all rents and profits should now be tried. * * * There is no basis under the pleadings and the evidence for cancelling (sic) the deeds, Exhibits

8 and 9. Such a cancellation would result in a loss for the other sons because of the dereliction, if any, on the part of Joseph Fiala and Frank Fiala. The remedy of Julia Fiala is adequate without requiring any forfeiture of title.

"4. Martha Bruner, Helen Leet, Lucile Fiala Wynn, Mary Rerucha and Victoria Bruner, as individuals, have no interest in the subject matter of the suit except as prospective heirs of Julia Fiala, which gives them no standing as plaintiffs herein. They have at all times mentioned in the pleadings been of full legal age and competent * * *. The petition insofar as it claims any rights in their behalf should stand dismissed."

The court then ordered that the motion for new trial be in part sustained and in part reversed; that the former dismissal of the case stand as to all parties except Julia Fiala, by Mary Rerucha and Victoria Bruner, as her next friends, as plaintiff, and Frank Fiala and Joseph Fiala, as defendants, for an accounting of their acts and doings as agents; and that the case be reinstated for trial for that purpose.

Exhibit No. 6, made July 3, 1937, appointed Frank Fiala and Joseph Fiala as agents to manage the land, collect the rents, pay the taxes, and keep the buildings in a good state of repair.

Exhibit No. 8 is a quitclaim deed between Julia Fiala, widow, and her sons and daughters whereby she conveys her interest in the land described therein to them, acknowledged December 6, 1936.

Exhibit No. 9 is a quitclaim deed made January 25, 1937, by the sisters and the husbands of those who were married at the time, to their brothers, share and share alike, as tenants in common, wherein the sisters conveyed their interests in the land described therein for and in consideration of $500 to Martha Fiala, $500 to Lucile Fiala, $500 to Helen Leet, $1 to Mary Rerucha, and $1 to Victoria Bruner, to them duly paid and receipts acknowledged. This deed carried the following

provision: "It is agreed and understood by the parties hereto that the property hereinbefore described is subject to a certain life use to Julia Fiala * * *."

Exhibit No. 10 is a life lease made December 6, 1936, by the sons and daughters of Julia Fiala and the husbands and wives of those who were married at the time, providing for payment to Julia Fiala of the life income from the real estate conveyed by her to her sons and daughters. This instrument provided that in case any of the conditions were broken by the sons and daughters, the conveyance made to them should be void and Julia Fiala should have the full rights in the real estate as though the conveyance had not been made.

The plaintiffs assign as error the overruling of the plaintiffs' motion for new trial filed April 23, 1956, on the ground that said motion was filed out of time.

The trial court rendered its judgment on April 12, 1956. The motion for new trial was filed on April 23, 1956. The day the judgment was entered is excluded. The tenth day fell on Sunday, and it is excluded. The motion for new trial was filed on the eleventh day, which was Monday. The motion was filed in time. See Harsche v. Czyz, 157 Neb. 699, 61 N. W. 2d 265.

Some contention is made by the plaintiffs that the order of the trial court of December 22, 1955, and its order of April 12, 1956, are contradictory with reference to the issues tried by the trial court. The final order of the trial court entered April 12, 1956, clearly indicates that all of the issues joined by the pleadings were tried and determined by the trial court, with the exception of the issue of the accounting. Regardless of the orders or the judgment rendered by the trial court, the cause is here for trial de novo. The following are applicable.

An equity court obtaining jurisdiction of a cause for any purpose will retain it for all purposes and proceed to final determination of all matters in issue thus avoiding unnecessary litigation. See, Schreiner v. Witte, 143

Neb. 109, 8 N. W. 2d 831; Dennis v. Omaha Nat. Bank, 153 Neb. 865, 46 N. W. 2d 606, 27 A. L. R. 2d 674; Brchan v. The Crete Mills, 155 Neb. 505, 52 N. W. 2d 333; Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131.

Actions in equity, on appeal to this court, are triable de novo, subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. See O'Brien v. Fricke, 148 Neb. 369, 27 N. W. 2d 403.

We conclude that there is no merit to the plaintiffs' contention with reference to the contradiction in the orders of the trial court claimed by them as above set forth.

This brings us to the questions as to whether or not the dismissal of the action filed by Julia Fiala should be sustained, and did the trial court err in determining that Julia Fiala, as the real party in interest, was not competent to bring the action in her own behalf and was properly represented by two of her daughters as next friends.

In addition, we will consider the evidence in connection with the assignment of error made by the plaintiffs that the trial court erred in failing to cancel the conveyance as pleaded in the plaintiffs' second amended petition.

Before setting forth the evidence on the issue of the competency of Julia Fiala to bring this action as the real party in interest in her own right, we deem it necessary to set forth the following authorities with reference to such issue.

As stated in 28 Am. Jur., Insane and Other Incompetent Persons, § 104, p. 738: "The decisions are generally agreed, moreover, that in all cases where a person is not actually insane, but is incapable, through age or

weakness of mind, of conducting his affairs, suits may be maintained in his behalf by his next friend, and that it is within the discretion of the court to allow a suit so instituted to proceed; it may order a stay of proceedings to await the due appointment of a general guardian, or order the same discontinued, as it sees fit." See, also, Henry v. Edde, 148 Kan. 70, 79 P. 2d 888; Plympton v. Hall, 55 Minn. 22, 56 N. W. 351, 21 L. R. A. 675; Annotation, 64 L. R. A. 533.

In 28 Am. Jur., Insane and Other Incompetent Persons, § 124, p. 754, it is stated: "In general, any proof that is material and relevant to the issue of sanity or competency may be admitted upon the trial of such issue; * * *. The tendency of most courts before whom an issue of sanity or competency is presented for determination is to permit a relatively wide latitude in admission of proof of insanity or incompetency." See cases cited under note 17.

"It is well settled that in the determination of the mental condition of a person, his conversation, acts, declarations, and conduct in general may be shown at the trial, upon the theory that such proof is frequently decisive upon the question of sanity and insanity." 28 Am. Jur., Insane and Other Incompetent Persons, § 132, p. 759.

In 28 Am. Jur., Insane and Other Incompetent Persons, § 138, p. 764, it is said: "* * * the physical condition of a person alleged to be incompetent may be considered only in so far as it affects his mental condition." See, also, Annotations, 17 A. L. R. 1074, 113 A. L. R. 356.

There is no statute in this state which forbids commencement of an action by an incompetent by his next friend when incompetency has not been adjudged and no guardian has been appointed. The authorities are quite uniform that such an action may be maintained when the person in whose behalf the action is commenced is not insane but incapable of managing his affairs, has not been adjudged to be incompetent, and has no appointed guardian.

The record discloses that Julia Fiala gave birth to 11 children during her marriage relationship with Frank J. Fiala who died in November 1936. One of the children died; the other ten, five sons and five daughters, all grew to adulthood and married. At the time of trial Julia Fiala was nearly 80 years old. She testified that Mrs. Bruner, one of her daughters, purchased her groceries during the time she lived in David City, which was probably from 1938. Sometimes her sons Frank or Raymond brought groceries to her, but not often. She never bought them herself, nor did she pay for anything during the time she resided in David City. Her husband, during his lifetime, attended to all business matters. She could understand what a dollar or fifty cents was, but was not able to recognize the denomination of currency. From her testimony it appears also that she was unable to read and comprehend the meaning of the English language and was not too well versed in the Bohemian language. She was unaware of the fact that she had $4,000 on deposit in the Brainard bank.

Victoria Bruner, a daughter of Julia Fiala, testified that she lived in David City, was 58 years old, and lived with her parents on the home farm until she was married in 1916. After the birth of her fourth child, Julia Fiala became partially paralyzed from which she has never fully recovered. Julia Fiala did not understand the value of money, except perhaps she knew the value of a dime or a nickel, and never transacted any business. The father of this witness was in business in Brainard from 1910 to 1922. Her mother never directed the farm work or told the children what to do around the farm.

Lucile C. Wynn, another daughter of Julia Fiala, testified that she was 54 years old and was the fourth child born to Julia Fiala. She lived on the home place until she was 22 years old, and had charge of the home until she left. Her mother was very nervous and often criticized and scolded the children without cause. The children would then appeal to their father for an under-

standing, and he would listen to their complaints and render them advice as to what to do under the circumstances. Due to her physical condition, Julia Fiala was unable to express herself, and her sentences were incomplete. She did not advise the daughters in the preparation of food or sewing. The oldest daughter and her father always bought the food, and her father and her sister advised her in the preparation of the food.

Mary Rerucha, a daughter, testifed that she was 62 years old and she took part in the management of the home because her mother was weak and had to be helped. She helped with the work as soon as she was old enough to do anything. Her mother had headaches which occurred at intervals and which have since persisted. She stayed at home until she was 26 years of age in 1920, when she married. There was considerable sewing to be done because of the large family, and they made most of their clothes. The sewing was done by the girls. Her father usually ordered the groceries. When she was old enough, he gave her the money to purchase them, and as she grew older she had the responsibility of the cooking. Her father taught the children their prayers and the Bohemian language. Her mother never took any part in the management of the farms. Frank was her mother's agent after her father died.

Alois Rerucha, a son-in-law of Julia Fiala, testified that Julia Fiala does not read, she just looks at the pictures in the paper; that she has had no experience in the management of farms and does not understand business; and that at the time this litigation was started, she was not fully capable of managing her business.

The record shows that prior to his death, Frank J. Fiala had been talking about a plan as to the manner of settling his estate. He wanted his sons to have the land, and his daughters to have $500 each, or the equivalent in personal property. The reason his plan for settlement was not made in accordance with his wishes was because Raymond, the youngest son, was not yet

21 years of age. He was within 2 months of his twenty-first birthday when his father was killed. A few days after Frank J. Fiala passed away, Alois, after obtaining advice from the family, engaged the services of attorneys to come to the family home and advise the family with reference to the settlement to be made to conform to the father's plan. Thereafter all of the sons and daughters met at the home of their mother. There was some discussion among members of the family with reference to the settlement and suggestions made by the attorneys. As a result the mother and all of the children agreed to the settlement as heretofore stated.

The evidence discloses that Julia Fiala is incapable of understanding how to transact business or to understand business transactions. She is unacquainted with the denominations of currency and the value of money; she is not capable of reading and writing the English language to the extent of making any kind of an analysis by herself with reference to her rights; nor, for that matter, is she sufficiently able to comprehend in the Bohemian language business transactions that might affect her rights. In addition, her physical condition, which to some extent affects her mentality, is one of the factors in considering her responsibility to transact business.

We conclude that the trial court was correct in determining that Julia Fiala should be represented by her next friends, two of her daughters.

We fail to find any evidence of fraud on the part of any of the defendants with reference to the settlement made by the mother, Julia Fiala, and her sons and daughters regarding the estate of the husband and father, Frank J. Fiala, deceased. All of the parties to the settlement approved it. It would appear that had the plan and the settlement made in accordance therewith not been acceptable to the mother or her sons and daughters, all having an interest therein, it would undoubtedly and without question have been questioned before the pas-

sage of at least 17 years or more by some one of them. In addition, all of the children, both the sons and daughters, had a duty and a responsibility insofar as exhibits Nos. 8, 9, and 10 are concerned, to see that their mother received the rents and profits from the land during her lifetime.

We conclude that the trial court did not commit error in finding that there was no evidence of fraud in the execution and delivery of the deeds as shown by exhibits Nos. 8 and 9 and the life lease as shown by exhibit No. 10.

We should add that while the decree of the district court might indicate that the daughters of Julia Fiala at no time were parties having an interest in the subject matter in litigation, they in fact did have such an interest for had they succeeded in obtaining judgment canceling the conveyance as prayed for in the plaintiffs' second amended petition, they then would have been entitled to their respective interests in the land owned by their father at the time of his death, since he had died intestate. Having failed to prove fraud, as stated by the trial court in its decree, the daughters have no interest in the subject matter of the action.

The issue with reference to an accounting as to whether or not Joseph Fiala or Frank V. Fiala have fulfilled their duties as agents as set forth in exhibit No. 6, and collected and accounted for all the rents and profits was reserved for future determination by the trial court.

For the reasons given in this opinion, the plaintiffs having failed to prove fraud as heretofore set forth, the judgment of the trial court is affirmed.

AFFIRMED.

ALLSTATE INSURANCE COMPANY, A CORPORATION, APPELLEE, V. SEBASTIAN ENZOLERA, APPELLANT.
81 N. W. 2d 588

Filed March 8, 1957. No. 34079.

1. Larceny. Generally, a thief can acquire no title to stolen property, nor can title to personal property be acquired through another's larceny or theft.
2. Automobiles. The subsequent purchaser for value of an automobile who obtains a certificate of title, based upon a previous valid title thereto and compliance with statutory requirements, obtains title and ownership superior to that of a prior purchaser.
3. ———. A purchaser for value of an automobile who obtains a certificate of title based upon a previous false or fraudulently obtained title obtains no title as against a previous purchaser and holder of a valid certificate of title to the automobile.

APPEAL from the district court for Sarpy County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Louis T. Carnazzo, Joseph A. Troia, and *Paul J. Garrotto,* for appellant.

Mecham, Stoehr, Rickerson & Sodoro, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action in replevin by Allstate Insurance Company, a corporation, plaintiff and appellee, against Sebastian Enzolera, defendant and appellant. The case was tried to the court, a jury having been duly waived. The judgment was in favor of the plaintiff and against the defendant. A motion for new trial was duly filed and by the court overruled. From the judgment and the order overruling the motion for new trial the defendant has appealed. The assignments of error are that the judgment is contrary to law; that the judgment is contrary to the evidence; and that the evidence is insufficient to sustain the allegations of plaintiff's petition.

In order to properly understand the matters pre-

sented for review on this appeal it appears necessary to review the background of the controversy. In doing so an effort will be made to respect the chronology of events as they occurred.

The first step in this chronology is a certificate of title to a Chevrolet automobile bearing number 0234946F54Y issued by the Department of Highways, Division of Motor Vehicles, of the State of Delaware, to one James V. Matha on February 8, 1954. This certificate is in evidence without any challenge as to its authenticity or as to foundation for its admission. This is true as to all other exhibits in the bill of exceptions. The basis upon which the certificate was issued does not appear. No facts have been disclosed showing, or from which a legal inference could flow, that any irregularity was involved in the issuance of the certificate.

Thereafter James V. Matha, on March 11, 1954, in San Diego, California, sold the automobile to one Fred Richter for $1,950. The transfer was made to Richter on the basis of the Delaware certificate of title. Matha signed in blank a form of assignment on the back of the certificate. He also gave Richter a bill of sale. He also signed in blank his registration card from the State of Delaware. At the same time on the basis of these documents Richter made application for a certificate of ownership and for a registration card from the Department of Motor Vehicles of the State of California. The application was accepted and the certificate and card were issued. They were not issued on that date but were issued on March 29, 1954. In the presentations of the parties no significance is attached to this delay.

On March 21, 1954, the automobile was stolen from the garage of Richter in San Diego, California. On discovery of the theft Richter notified the agent of the plaintiff herein. The plaintiff was his insurance carrier. This particular automobile had not been directly insured but by the terms of a policy of insurance on another automobile theft insurance attached to this one.

The insurance was paid to Richter by the plaintiff and Richter transferred his title to plaintiff. Apparently thereafter, on or about April 29, 1954, the plaintiff obtained an assignment of the certificate of ownership from Richter and thereafter on May 11, 1954, received a certificate of title from the State of California.

On April 5, 1954, James V. Matha obtained a Nebraska certificate of title from the county clerk of Otoe County, Nebraska. This certificate was issued to him on the basis of a duplicate copy of a certificate which had been issued to him by the clerk of courts of Portage County, Ohio, on February 23, 1954. By recital on the face of the certificate it appears that the original had been issued to him on February 5, 1954.

On April 6, 1954, James V. Matha sold the automobile to the defendant and on the basis of the certificate which Matha had obtained from the county clerk of Otoe County, the defendant obtained a certificate of title from the county clerk of Sarpy County, Nebraska.

On the facts as outlined and the law, the plaintiff contends that Richter had title and the right to possession of the automobile at the time it was stolen and that as successor to those rights the plaintiff is entitled to recover it. It urges that nothing has taken place which has in any wise impaired that right.

On the other hand the defendant insists that he is an innocent purchaser for value and that on the evidence and law he is entitled to be adjudged the true owner and title holder of the automobile.

On the record made it must be assumed that, there being no evidence to the contrary, Richter became the owner of the automobile with an unimpaired title thereto and that thereafter while he was the owner of the same it was stolen from him. He obtained his possession and title pursuant to a certificate of title issued to Matha in the State of Delaware which insofar as the record is concerned was regular in form and substance. Also there is no evidence that it was not issued on proper

authority. On the basis of this certificate, assigned to Richter by Matha, and the purchase of the automobile, Richter was duly issued a certificate of title and a registration certificate by proper authority in the State of California. The regularity of the issuance of this certificate under the laws of California is not brought into question. The sufficiency of the transfer of the Delaware certificate within the meaning of the laws of that state is raised, but it is not pointed out how that did or could impair the right of Richter to obtain in good faith a certificate of title in California under the laws of California to an automobile, the title to which was not at that time in any wise impaired.

In the light of these facts and well-established principles of law neither the thief nor anyone taking through him took or could take any title to the automobile. Richter remained the owner with the right to recover possession of it wherever found, subject however to the right of a transferee to take it instead, in case Richter had transferred his title and interest. It should be said here that the defendant does not contend herein that the right of Richter to recover, if he had such right, has not passed to the plaintiff.

The rule applicable is the following, as stated in State ex rel. Sorensen v. Nebraska State Savings Bank, 127 Neb. 262, 255 N. W. 52: "Generally, a thief can acquire no title to stolen property, nor can title to personal property be acquired through another's larceny or theft." See, also, Snyder v. Lincoln, 150 Neb. 580, 35 N. W. 2d 483. This case was before the court again in 153 Neb. 611, 45 N. W. 2d 749, and 156 Neb. 190, 55 N. W. 2d 614, but there was no departure from the foregoing pronouncement.

The defendant urges that this rule is not controlling in the case at bar. In effect he urges that the certificate of title provisions of the Nebraska Motor Vehicle Act and the decisions of this court protect him against the claims of the plaintiff.

Section 60-105, R. S. Supp., 1955, provides in part: "No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle, * * * sold or disposed of, or mortgaged or encumbered, unless evidenced by a certificate of title or manufacturer's or importer's certificate duly issued, in accordance with the provisions of this act."

In interpretation and application of section 60-105, R. R. S. 1943, which contained the same substance as this provision, the following was said in Loyal's Auto Exchange, Inc. v. Munch, 153 Neb. 628, 45 N. W. 2d 913: "A subsequent purchaser for value of the automobile, who obtains the certificate of title by complying with the statutory requirements relating thereto, obtains the title and ownership thereof. His title and ownership are superior to any rights which the first purchaser may have."

The defendant herein, as pointed out, obtained a Nebraska certificate of title to this automobile and on the basis of this statute and this interpretation he insists that his title is secure. His insistence however is without merit.

It is to be observed that the recognition required by the statutory provision and the decision is a certificate "duly" issued. This term implies, we think, that the issuance must be based upon a proper background of authority. If there could be any doubt as to this it has been removed by the later decisions of this court.

In Snyder v. Lincoln, 156 Neb. 190, 55 N. W. 2d 614, in explanation in part of what was said in Loyal's Auto Exchange, Inc. v. Munch, *supra,* it was said: "We did not say that the possession of a certificate of title was an absolute muniment of title. A thief with a certificate of title to a stolen automobile does not divest the owner of his right to take it wherever he can find it. A certificate of title is essential to convey the title to an automobile, but it is not conclusive of ownership. It is simply the exclusive method provided by statute for the trans-

fer of title to a motor vehicle. It conveys no greater interest than the grantor actually possesses." See, also, Terry Bros. & Meves v. National Auto Ins. Co., 160 Neb. 110, 69 N. W. 2d 361; Burns v. Commonwealth Trailer Sales, 163 Neb. 308, 79 N. W. 2d 563.

It is clear that Matha did not obtain his certificate of title in the manner provided by statute. Section 60-106, R. R. S. 1943, as amended by the laws of 1953, contains the provision applicable in the present instance, as follows: "If a certificate of title has not previously been issued for such motor vehicle in this state, such application, * * * shall be accompanied by * * * a certificate of title, a court order issued by a court of record, * * * or an assigned registration certificate, if the law of the other state from which such motor vehicle was brought into this state does not have a certificate of title law. The county clerk shall retain the evidence of title presented by the applicant and on which the certificate of title is issued." Within the meaning of this statute Matha, at the time he obtained his Nebraska certificate, had no valid indicia of a right to receive a certificate of title under the laws of Nebraska.

As has been pointed out this automobile was registered on the basis of a document which came from Ohio. The State of Ohio at the time had a certificate of title law, but the document presented by Matha was not a certificate of title. As shown on its face it was a duplicate issued 18 days after a certificate which, so far as known here, was proper and in due form.

Apparently a true certificate of title issued pursuant to the Ohio statutes may be relied upon as evidence of title and of the right and power to convey an automobile. Significantly though this is not true of a duplicate certificate.

Section 4505.08, Page's Ohio Revised Code Annotated, provides for the issuance of certificates of title. It contains no restrictions upon the title represented by the certificate. Section 4505.12 provides for the issuance

of duplicate certificates in the event originals are lost or destroyed. This section contains the following: "Said certified copy and all subsequent certificates of title issued in the chain of title originated by said certified copy shall be plainly marked across their faces 'duplicate copy,' and any subsequent purchaser of said motor vehicle in the chain of title originating through such certified copy acquires only such rights in such motor vehicle as the original holder of said certified copy himself had."

Permission for the issuance of duplicate certificates and transfer of automobiles based thereon in this state is also found in the statutes of this state. § 60-112, R. R. S. 1943. The Nebraska statutes do not put a purchaser who buys an automobile and takes through a duplicate certificate on notice of possible impairment of title in the same manner as is done under the Ohio statute, but such purchaser is not left without warning. Section 60-112, R. R. S. 1943, with respect to purchases pursuant to duplicate certificates, contains the following: "Any purchaser of such motor vehicle may at the time of such purchase require the seller of the same to indemnify him and all subsequent purchasers of such motor vehicle against loss which he or they may suffer by reason of any claim or claims presented upon the original certificate."

It becomes apparent therefore that neither under Ohio nor Nebraska statutes could the defendant contend that he obtained the paramount title to the automobile in question. He took it subject to the valid title which, as disclosed by the evidence, was, at the time he obtained it, in Richter. This being true, and it being made to appear that title was duly transferred to the plaintiff, the judgment of the district court should be and is affirmed.

AFFIRMED.

ELDON FARR, APPELLEE, V. CAMBRIDGE CO-OPERATIVE OIL COMPANY, A CORPORATION, APPELLANT.
81 N. W. 2d 597

Filed March 8, 1957. No. 34082.

1. **Master and Servant: Torts.** The relation of master and servant does not generally render the master liable for the torts of his servant, unless connected with his duties as such servant or within the scope of his employment.
2. ———: ———. If such servant does an act merely to frighten a third person or to perpetrate a joke on a third person, and the act is entirely disconnected from the purpose of the employment, the master generally is not liable therefor.
3. ———: ———. A master is under a duty to exercise reasonable care so to control his servant while acting outside the course of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the servant is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or is using a chattel of the master, and the master knows or has reason to know that he has the ability to control his servant, and knows or should know of the necessity and opportunity for exercising such control.

APPEAL from the district court for Furnas County: VICTOR WESTERMARK, JUDGE. *Reversed and remanded with directions.*

Aten & Chadderdon, for appellant.

Morrison, Lyons & Starrett, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiff, Eldon Farr, brought this action against defendant, Cambridge Co-Operative Oil Company, a domestic corporation, seeking to recover damages for alleged personal injuries. Plaintiff predicated his right of recovery upon allegations that two named employees of defendant negligently and in disregard of plaintiff's safety set off an explosion while on duty and in fur-

therance of defendant's business; that defendant's managers, having knowledge of the facts while acting for and on behalf of defendant, negligently permitted the practice to continue; and that the permitting of such explosion on or about defendant's premises constituted an actionable nuisance which was the proximate cause of painful injuries in and around plaintiff's ears and partial loss of his hearing. In that connection, plaintiff relied upon the alleged negligence of defendant, and his nuisance theory was not an issue in the trial court. Thus, it was not presented or argued in this court.

Insofar as important here, defendant's answer denied generally; denied specifically that the alleged acts of its employees were within the scope of their employment or in the furtherance of defendant's business; and denied specifically that defendant or its management had any knowledge of the circumstances alleged, or that its management suffered or permitted the practice to continue as alleged. Plaintiff's reply was a general denial.

The cause was tried to a jury whereat defendant's motions for directed verdict or dismissal, made at conclusion of plaintiff's evidence and again at conclusion of all the evidence, upon the ground of insufficiency of the evidence to support a verdict in favor of plaintiff, were overruled. After submission of the cause to the jury, it returned a verdict for plaintiff and judgment was rendered thereon. Subsequently defendant's motion for judgment notwithstanding the verdict or in the alternative for new trial, was overruled. Therefrom defendant appealed to this court, assigning among other alleged errors that the trial court erroneously failed to sustain defendant's motion for judgment notwithstanding the verdict. We sustain that assignment, which disposes of all others.

In that connection, defendant relied upon the general rule stated in Crane v. Whitcomb, 160 Neb. 527, 70 N. W. 2d 496, and cases cited therein, that: "The relation

of master and servant does not render the master liable for the torts of the servant, unless connected with his duties as such servant or within the scope of his employment."

Concededly, the acts and conduct of defendant's employees, hereinafter recited, were not connected with their duties as servants of defendant or in the furtherance of defendant's business, or within the scope of their employment. Also, as stated in 57 C. J. S., Master and Servant, § 574 (c), p. 327, citing authorities: "If the servant does an act merely to frighten a third person * * * or to perpetrate a joke on a third person, and the act is entirely disconnected from the purpose of the employment, the master generally is not liable therefor."

However, such rules do not solve the problem presented if plaintiff, by a preponderance of competent evidence, has established his rights to recover under a related exception hereinafter set forth. In that connection, as stated in Restatement, Torts, § 317, p. 860: "A master is under a duty to exercise reasonable care so to control his servant while acting outside the course of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if (a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, and (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control." Such statement was construed and applied in Ford v. Grand Union Co., 268 N. Y. 243, 197 N. E. 266, and Dincher v. Great Atlantic & Pacific Tea Co., 356 Pa. 151, 51 A. 2d 710, citing numerous authorities. The latter case also cites numerous other related authorities in a note appended thereto.

We have examined the record in the light of the aforecited authorities, together with the rule that: "A mo-

tion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence." Crane v. Whitcomb, *supra*.

It is undisputed that on November 29, 1954, between 4 and 5 p. m., plaintiff, a farmer customer of defendant, drove his Chevrolet truck up to the pumps at defendant's motor vehicle gasoline and repair service station to have it serviced. He ordered gasoline for his truck, went into the men's rest room, and shut the door. While plaintiff was therein two employees of defendant then on duty decided to have some fun and play a joke or prank upon plaintiff. Thus, they went over into defendant's wash, grease, and repair room where they took a firecracker, about 2 inches long and thick as a pencil, out of a drawer in an old school desk standing about midway along the south wall. In that connection, firecrackers were not sold or handled by defendant as any part of its business. One of defendant's employees lit the firecracker while the other held it and then either placed it in or dropped it in front of the rest room grated ventilator sitting upright on the floor. There the firecracker exploded, as a result of which plaintiff claimed to have received personal injuries and damages.

The record discloses that the drawers in the desk from which the firecracker was taken contained complete sets of tools for special types of work and two or three firecrackers. There is no evidence that such desk was ever used by the manager. It is not shown when such firecrackers were placed therein, but it is clear that W. E. Jones, defendant's manager since January 1, 1953, did his work in the office and never knew that any fire-

crackers were in the desk or that any had been exploded by defendant's employees at or about the premises. He was not at the station at the time of the explosion on November 29, 1954, and knew nothing about it until 5 or 6 days afterward. At that time he inquired of his employees about it, and upon learning the facts, disposed of the remaining firecrackers and made it plain to defendant's employees that there should be no more such actions.

A man who had been employed by defendant during 1949 and 1950 as a station attendant, and during 1952, 1953, and until July 5, 1954, as a propane truck driver when he was discharged by defendant's manager, testified as a witness for plaintiff. He testified substantially as follows: That while he was so employed, Ervin Bennett, Keith Golden, Burgess Fultz, Don Sickles, and W. E. Jones had respectively been managers for defendant. He testified that during such years of employment he had shot off some firecrackers himself and saw certain employees of defendant shoot off fair-sized firecrackers at least four times in defendant's workroom or outside defendant's station. He could not remember either the year or the time of year when this was done. He did not know who brought the firecrackers there or when that was done, but knew that they were in that desk or elsewhere in the workroom and some remained in the desk when he left. He once brought some small firecrackers upon the premises. He testified that as far as he knew no manager was ever there when firecrackers were taken out of the desk or when they were exploded, but they might have been. He testified that former managers Fultz and Bennett had directed defendant's employees not to bring to or explode any firecrackers on or about the station, and they obeyed; but he shot one off in the workroom sometime during 1954.

We find no competent evidence adduced by such witness from which it could be reasonably concluded that

any manager of defendant ever knew or should have known that firecrackers were upon defendant's premises or that any had been previously exploded on or about defendant's premises by its employees. Plaintiff's contention otherwise is based entirely upon hearsay, speculation, and conjecture.

Another witness for plaintiff testified that once when he was in the rest room at defendant's station he heard an explosion which sounded like a shotgun. He testified that two named employees of defendant were around the station at that time although he did not see the firecracker or the explosion itself, but heard afterward that it was caused by a firecracker. He did not know who caused the explosion, and was not certain when it occurred, but thought it was in November 1953. He was certain that it did not happen in 1952 or 1954. The fact is, however, that one such employee named by him testified while a witness for plaintiff that he was not there at the time of such claimed explosion and knew nothing about it. Concededly, he never was employed by defendant until after August 1, 1954.

When such employee was called as a witness for defendant he testified that he lit the firecracker on November 29, 1954, but had never seen other firecrackers exploded in or about the station, and did not know who put firecrackers in the desk. After the explosion of November 29, 1954, occurred and manager Jones learned about it 5 or 6 days later, he reprimanded the witness and made it pretty plain to defendant's employees that it must never happen again.

Another witness for defendant testified that he had been employed at defendant's station full time from November 1945 to June 10, 1955, and heard but did not see the explosion on November 29, 1954. He never found any firecrackers around the station, but knew that there were some in the desk. He never heard or saw any explosion of firecrackers there except once when two of defendant's employees exploded one while he was

in the rest room some 4 or 5 years ago. He knew that several years before a buzz bomb had been placed in another employee's car out in defendant's car parking lot.

Another witness for defendant had been employed at the station for more than 3 years. He kept some firecrackers in the desk in the workroom. He admitted that another employee got the firecracker out of the desk and he held it while it was lit by the other employee, after which he dropped it in front of the rest room ventilator on November 29, 1954. Defendant's employees were friendly with plaintiff and had joked with him upon other occasions when he had been there. There is no evidence that the two who caused the explosion had any intention of harming him. The witness had exploded a firecracker only once 2 or 3 weeks before November 29, 1954, at the same place when another man was in the rest room and while the manager was away, and they all had a good laugh about it. He had heard that one firecracker had been so exploded sometime before he came there to work 3 years ago. The explosion on November 29, 1954, was the only one manager Jones ever knew about, and upon subsequently learning of it he made it plain that it should never occur again.

In the light of such evidence, it is conclusive that defendant's employees had no intention to harm plaintiff, and the explosion occurred upon the premises in possession of defendant but without using any chattel of defendant. It could be reasonably concluded that defendant's two employees so conducted themselves outside the scope of their employment by exploding a firecracker in or about a gasoline service station as to create an unreasonable risk of bodily harm to plaintiff. However, under the evidence adduced plaintiff was not injured by any facility or property of defendant. It could not be reasonably concluded with regard to the conduct involved that defendant's manager Jones timely

knew or had any reason to know, or that any previous manager of defendant timely knew or had any reason to know, that they had the ability to control defendant's employees, or that they knew or should have known of the necessity and opportunity for exercising such control.

In Ford v. Grand Union Co., *supra,* speaking of the duty of a master to control his servants on his business premises, it is said: "The duty, if any, is certainly not absolute. The owner of property not inherently dangerous, who does not knowingly permit others to put the property to a dangerous use, is not subject to any absolute duty to prevent unauthorized persons from putting it to a dangerous use. Here there must be at least notice that a dangerous use is threatened, and perhaps acquiescence in such use. Again, where there is no notice that an employee is in the habit of acting in a manner dangerous to others, there is no duty to control the actions of the employee outside the scope of his employment. Such limitations, at least, are dictated by fundamental principles of tort liability. Without them there would be no room for the doctrine that a person is responsible only for the result of his own fault or the fault of his servants, acting within the scope of their employment.

"In some cases, nevertheless, the possessor of property used for business has been held liable for failure to control his servants, though acting outside the scope of their employment, or other persons permitted to come upon or use such property. It is to be noted, however, that even in these cases, the courts held that the duty was not absolute, but relative. It arises only where, from the nature of the authorized use of property or from a course of conduct of visitors or of employees employed upon or in connection with the property, the possessor has notice that the use of his property, by persons acting without his authority but whom he could control, may cause danger to members of the general public. When such duty exists, it is limited to the exercise of skill and

care commensurate to the danger which may reasonably be anticipated. * * * Where danger cannot reasonably be anticipated there is no duty to guard against it; after knowledge or notice of danger is present there must be reasonable opportunity to guard against the danger. Here no want of care by the defendant is shown, for at the moment when duty arose, opportunity to use care disappeared." See, also, Dincher v. Great Atlantic & Pacific Tea Co., *supra*. Such statement and authorities heretofore cited are applicable and controlling here.

We conclude that the evidence was insufficient to support a verdict for plaintiff and judgment thereon. Therefore, the judgment should be and hereby is reversed and the cause is remanded with directions to sustain defendant's motion for judgment notwithstanding the verdict and dismiss plaintiff's action. All costs are taxed to plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

LEROY HOLLIDAY, APPELLANT, V. EDWIN L. PATCHEN, APPELLEE.

81 N. W. 2d 593

Filed March 8, 1957. No. 34096.

1. **Trial: Appeal and Error.** When a trial court sustains a motion for judgment notwithstanding the verdict, the party against whom it is sustained is entitled on appeal to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Automobiles: Trial.** If the evidence is undisputed, or such that but one conclusion could reasonably be reached, whether or not a person riding in a motor vehicle is a guest is a matter of law for the court.
3. **Automobiles: Negligence.** Gross negligence within the meaning of the motor vehicle guest statute is great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.
4. ———: ———. For a guest to recover damages from a host

for injuries received while riding in an automobile operated by the host, he must prove by a preponderance of the evidence the gross negligence relied upon, and that it was the proximate cause of the accident.

5. **Negligence.** When the evidence is resolved most favorably toward the existence of gross negligence and the facts thus determined, the question of whether or not they support a finding of gross negligence is one of law.
6. **Automobiles: Negligence.** The operation of an automobile at a rate of speed prohibited by law is not in itself gross negligence.
7. ———: ———. Momentary inattention in the operation of a motor vehicle does not ordinarily amount to gross negligence. This is true even where such inattention is voluntary and in no manner induced by a distracting influence.
8. ———: ———. A warning of imminent danger to a host by a guest riding in an automobile operated by such host must be made in time to afford the host a reasonable opportunity to avoid the accident, if such warning is to operate to the benefit of the guest.
9. **Trial.** Where the record shows that a motion for a directed verdict should have been sustained at the close of the evidence, it is proper for the trial court to sustain a motion for judgment notwithstanding the verdict in favor of the party entitled to the directed verdict.

APPEAL from the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Sam S. Diedrichs, for appellant.

Beatty, Clarke, Murphy & Morgan, Donald W. Pederson, and *Frank E. Piccolo, Jr.,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an action by the plaintiff, LeRoy Holliday, against the defendant, Edwin L. Patchen, to recover for personal injuries sustained by the plaintiff while he was a guest in the defendant's automobile. The jury returned a verdict for the plaintiff for $11,654.64. The trial court thereafter sustained defendant's motion for a judgment notwithstanding the verdict. The plaintiff appeals.

The accident occurred on January 7, 1954, on a county road between Dickens and North Platte in Lincoln County, after dark at about 7 p.m. The road was graveled and dry. The accident happened near a bridge, the defendant's automobile going off the road and turning over after crossing the bridge. The bridge was 24 feet wide and 8 feet in length. The center of the bridge was from 12 to 18 inches higher than the road on either end of it. The evidence shows that the road turned to the left at the east end of the bridge, but as one approached it from the west the road appeared to continue on straight east. The road turned left at the east end of the bridge around a ditch or slough, and returned to the section line a short distance beyond the east end of the bridge. The curve could not be observed until one was close to the bridge, which resulted in the illusion that the road continued on due east. Defendant was not familiar with the road upon which he was driving and did not know about the curve at the east end of the bridge.

The defendant lived on a farm a few miles south of North Platte. The plaintiff, during the forenoon of January 7, 1954, was assisting defendant in pouring a cement floor in the basement of his farmhouse. The plaintiff came to work with one Bud McKillip in the latter's pickup truck, the plaintiff doing the driving. McKillip was incapacitated and was not able to operate a motor vehicle. An understanding was reached whereby plaintiff and defendant would take McKillip and his pickup truck to McKillip's home in Hayes Center during the afternoon and return in the defendant's automobile. They were returning from this trip at the time the accident occurred. The defendant was driving and plaintiff was occupying the right front seat. Two small children of the defendant were riding in the rear seat. There is a dispute in the evidence as to when it got dark. Both parties testified, however, that it was dark at the time of the accident and that the headlights were burning at

that time. Plaintiff testified that the dimmed headlights were being used because a defective switch prevented the use of the bright lights. Plaintiff stated that the range of the lights was about 30 feet; the defendant said 40 to 50 yards. There is no evidence of any complaint being made by the plaintiff because of the lights.

The road west of the bridge where the accident occurred was straight and level. Plaintiff testified that they approached the bridge at a speed of 60 or 70 miles per hour. The defendant said it was 45 to 50 miles per hour. The two small children in the rear seat had become tired and fussy. As they approached the bridge, defendant turned to quiet them, keeping one hand on the steering wheel. As he turned back he saw the curve for the first time. He failed to make the turn, the car skidding approximately 90 feet and rolling over into the ditch on the south side of the road.

In determining the correctness of the trial court's order sustaining the motion of defendant for a judgment notwithstanding the verdict, the plaintiff is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466. We shall consider the evidence in accordance with this rule.

The evidence shows that McKillip was a friend of the plaintiff of long standing. The trip to Hayes Center, during which the accident occurred, was an accommodation to and for the benefit of McKillip. The defendant received no benefit other than to accommodate the plaintiff's friend McKillip. There is no evidence disputing this fact. The plaintiff was therefore a guest of the defendant at the time of the accident and the trial court properly so held as a matter of law. Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593; Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184.

The evidence most favorably considered in plaintiff's favor reveals the following situation: Plaintiff was rid-

ing with the defendant as his guest. Defendant was driving east on a graveled county road which was straight and level at a speed of 60 to 70 miles per hour. It was after dark and defendant was using his dimmed lights. No complaints as to defendant's driving were made during this portion of the trip, except that plaintiff said the road was crooked and that defendant would have to drive slower. As the defendant's automobile approached the bridge, the road appeared to continue on in a due easterly direction. Shortly before crossing the bridge, defendant turned in the seat to quiet the two small children, taking one hand from the steering wheel. As he turned back he discovered the curve just beyond the bridge which he had not previously seen because of the height of the bridge as compared with the road at each end of it. The plaintiff shouted a warning just as they entered upon the bridge. Defendant's car skidded into the south ditch and rolled over when he failed to negotiate the turn. Does such a state of facts raise a question of gross negligence? We think not.

For a guest to recover damages from a host for injuries received while riding in an automobile operated by the host he must prove by a preponderance of the evidence the gross negligence relied upon and that it was the proximate cause of the accident. When the evidence is resolved most favorably toward the existence of gross negligence and the facts thus determined, the question of its existence is one of law for the court. Calvert v. Miller, 163 Neb. 501, 80 N. W. 2d 123.

Gross negligence within the meaning of the motor vehicle guest statute has been defined by this court as great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty. Lincoln v. Knudsen, 163 Neb. 390, 79 N. W. 2d 716. The violation of traffic regulations concerning the speed and manner of operating a motor vehicle on the highway is not negligence of any kind or degree as a matter of law, but it is a fact to be

considered with other evidence in the case in deciding an issue of negligence. Born v. Estate of Matzner, *supra*. It appears therefore that the primary question to be determined in the present case is whether or not the defendant's momentary inattention to his driving when he turned to quiet his children, together with the other evidence and circumstances shown by the record, is sufficient to raise a question of gross negligence for the jury's consideration. We think the result is controlled by the following decisions of this court: Ottersberg v. Holz, 159 Neb. 239, 66 N. W. 2d 571, where the host driver's attention was momentarily diverted when he reached for his 10-month-old grandchild who had fallen from the front seat to the floor of the car; Johnson v. Jastram, 155 Neb. 376, 52 N. W. 2d 245, where the host driver momentarily removed his right hand from the steering wheel and his eyes from the road to strike at a wasp upon his person; Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381, where the host's operator momentarily had one hand off of the steering wheel while eating lunch; Black v. Neill, 134 Neb. 764, 279 N. W. 471, where the host driver turned his head to the left and pointed out a tree which had blown down upon a porch; and Lemon v. Hoffmark, 132 Neb. 421, 272 N. W. 214, where the driver of the automobile momentarily took one hand from the wheel and her eyes from the road while reaching for a sandwich from an occupant of the rear seat. Gross negligence was held not to exist in any of the foregoing decisions. Under the holding of these cases we conclude that the defendant in the present case was not guilty of gross negligence in momentarily taking one hand from the steering wheel in turning to quiet his two minor children who were riding in the rear seat. The rule is summarized in Johnson v. Jastram, *supra*, as follows: "This court has repeatedly held that momentary inattention such as is described in the evidence in this case does not amount to gross negligence. This is true even where the inattention is purely

voluntary and is in nowise induced or contributed to by a distracting influence."

The plaintiff contends that warnings given which were not heeded by the defendant were sufficient to warrant the submission of gross negligence to the jury. There is evidence of a warning as to a sharp curve at the base of a high hill on the road between Hayes Center and Dickens. The record is clear that defendant heeded the warning and slowed down materially, and made the turn in complete safety. This is not evidence of gross negligence. If anything, it is evidence that defendant used due care by heeding the warning of the guest.

Plaintiff testified that he warned the defendant of the curve as they aproached the bridge and he was able to observe the curve. The evidence shows that it was then too late to avoid the accident. The rule is: A warning given in ample time to permit the host a reasonable opportunity to avoid an accident may be sufficient to raise an issue of fact as to gross negligence. But where a warning is given at such a time as not to afford the host a reasonable opportunity to avoid the accident, it cannot have any such effect. Kiser v. Christensen, 163 Neb. 155, 78 N. W. 2d 823.

We conclude that there was no evidence in the present case that the defendant was heedless of the safety of those riding with him, or that he was guilty of negligence of a very high degree, or that his conduct indicated the absence of slight care. The trial court should have sustained defendant's motion to direct a verdict for him at the close of the evidence. Consequently the trial court properly sustained defendant's motion for a judgment notwithstanding the verdict.

AFFIRMED.

STATE OF NEBRASKA EX REL. CLARENCE S. BECK, ATTORNEY GENERAL, APPELLEE, V. CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, A CORPORATION, APPELLANT.
81 N. W. 2d 584

Filed March 8, 1957. No. 34097.

Mandamus. It is only where there is no room for controversy as to the right, and where from the facts set forth in the affidavit on which an application for a peremptory writ of mandamus is based the court can take judicial knowledge that a valid excuse is impossible, that a writ may issue without notice.

APPEAL from the district court for Thurston County: ALFRED D. RAUN, JUDGE. *Reversed.*

Neely, Otis & Neely, for appellant.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action wherein the State of Nebraska on relation of Clarence S. Beck, Attorney General, plaintiff and appellee, filed a petition in the district court for Thurston County, Nebraska, wherein a peremptory writ of mandamus was prayed against the Chicago, St. Paul, Minneapolis and Omaha Railway Company, a corporation, defendant and appellant. The pertinent substance of the petition and of the prayer will be set out later herein.

The peremptory writ was allowed. From the allowance of the writ the defendant has appealed to this court. It contends that the writ was issued without legal grounds or authority. Assignments of error which it contends are grounds for reversal are four in number. The statement of them or such of them as require consideration will be made hereinafter at the time they are considered.

By the petition it was alleged that the Nebraska State Railway Commission, which will hereinafter be referred to as the commission, a constitutional body with power to regulate rates and service and with general control of common carriers, on April 8, 1908, adopted General Order No. 11 which provides that no carrier operating local freight or passenger trains between stations in Nebraska shall discontinue any such train service or change time schedules until application has been made to the commission and its permission received to make such change; that on January 27, 1908, the commission legally adopted General Order No. 6 which provides that no carrier operating local freight or passenger trains between stations in Nebraska shall remove or abandon any switches or spurs in use in this state without the consent of the commission; that on April 26, 1950, an order was issued by the commission permitting the defendant, a common carrier operating a line of railway between Sioux City, Iowa, and Omaha, Nebraska, and intermediate and adjacent points in Nebraska, to operate triweekly mixed train service between Omaha and Sioux City; that the schedule provides for alternate daily service as follows: Departure from Sioux City on one day at 8:30 a.m. and arrival in Omaha at 6:30 p.m., and from Omaha the next day at 7:30 a.m. with arrival at Sioux City at 5 p.m.; that this service was discontinued on or about July 18, 1950, and since that time there has been no resumption of that service; that permission has never been granted for the discontinuance of the service by the commission; that since that time triweekly service has been maintained only from Omaha to and from Pender, Nebraska; that the character of service southward from Sioux City, if any, is not known; that the reason for the discontinuance of service north from Pender was damage by flood to a railroad bridge located about 1½ miles north of Pender which the defendant was required to keep in repair and to repair and make usable in case of damage thereto;

that after July 18, 1950, demand was made for restoration of the service with which demand the defendant has never complied; that in May 1956 the defendant substituted biweekly for triweekly service between Omaha and Pender without permission from the commission; that the defendant had refused and neglected to make necessary repairs to the bridge referred to and to restore the service, contrary to the exactions of General Order No. 11; and that the defendant has violated General Order No. 6 in regard to abandonment of switches. No particulars as to abandonment of switches are set forth in the petition.

The prayer of the petition is for a peremptory writ of mandamus requiring the defendant to operate said line of railroad in accordance with the order of the commission entered on April 26, 1950, until such time as it shall obtain permission of the commission to discontinue or change the service; to further require it to do and perform any and all acts necessary to furnish such service; and for such other and further relief as may be just and equitable.

On June 8, 1956, the cause came on for hearing on the petition and affidavit of the Attorney General without notice of any kind to the defendant and the following order was entered by the court:

"IT IS THEREFORE CONSIDERED, ORDERED AND DECREED BY THE COURT that a peremptory writ of mandamus forthwith issue, requiring the defendant to operate trains #15 and #16 between Omaha, Nebraska, and South Sioux City, Nebraska, on a through and continuous line of railroad as set out in the order of the Nebraska State Railway Commission entered April 26, 1950, in application number 17924, and to reinstate the same service that existed under its line of railroad between Omaha and South Sioux City prior to July 18, 1950. It is further ordered that the defendant shall within a reasonable time make any needed repairs necessary to carry out the provisions of this order.

"It is further ordered that such service shall be conducted by the defendant until such time as it complies with General Order No. 11 of the Nebraska Railway Commission and receives permission to discontinue any of such services."

The first error assigned as ground for reversal is that: "The trial court erred in issuing a peremptory writ of mandamus without notice to the defendant or an opportunity to be heard."

Two types of writs of mandamus are recognized and defined by the statutes of this state. They are peremptory and alternative. § 25-2158, R. R. S. 1943. The one of primary concern in this case is the peremptory writ. As to the peremptory writ, section 25-2159, R. R. S. 1943, contains the following: "When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance. In all other cases, the alternative writ must be first issued; * * *."

As to the alternative writ, section 25-2158, R. R. S. 1943, contains the following: "The alternative writ must state concisely the facts showing the obligation of the defendant to perform the act, and his omission to perform it, and command him, that immediately upon the receipt of the writ, or at some other specified time, he do the act required to be performed, or show cause before the court whence the writ issued, at a specified time and place, why he has not done so; * * *."

This court in varying terms but with a single meaning and purpose has clearly set forth the necessary conditions antecedent to the right and power of courts, within the meaning of the statute, to issue writs of mandamus without notice and without affording defendants an opportunity to resist the issuance of a peremptory writ of mandamus. From this there has never been a departure.

In a syllabus point in Horton v. State ex rel. Hayden,

60 Neb. 701, 84 N. W. 87, it was said: "No person can be deprived of his property or other valuable right by the exercise of judicial or other governmental power, without notice to such person and reasonable opportunity to be heard in his defense."

In State ex rel. Niles v. Weston, 67 Neb. 175, 93 N. W. 182, it was said: "The rule is that before the court is warranted in granting a mandamus it must be made to appear that the relator has a clear legal right to the performance by the respondent of the duty which it is sought to enforce, and that nothing essential to that right will be taken by intendment."

In State ex rel. Chicago & N. W. Ry. Co. v. Harrington, 78 Neb. 395, 110 N. W. 1016, it was said: "It is only where there is no room for controversy as to the right, and where from the nature of the facts set forth in the affidavit the court can take judicial knowledge that a valid excuse is impossible, that a writ may issue without notice."

In that opinion it was also said relative to a situation where a peremptory writ is sought but the right to its issuance is not clear: "Under these provisions an alternative writ, and not a peremptory writ, should be issued in the first case, or, if a peremptory writ is applied for, a notice to show cause why it should not issue should be given and a hearing had before its issuance."

In State ex rel. Platte Valley Irr. Dist. v. Cochran, 139 Neb. 324, 297 N. W. 587, it was said: "When it does not clearly appear that a valid excuse cannot be given, a court has no power to issue a peremptory writ of mandamus without notice, and a writ so issued is void."

In Summit Fidelity & Surety Co. v. Nimtz, 158 Neb. 762, 64 N. W. 2d 803, which was a case wherein a peremptory writ of mandamus was issued without notice, this court, in reviewing with approval the cases which have been cited herein and others of like import, said: "Before the court is warranted in granting a peremptory

writ of mandamus, it must be made to appear that the relator had a clear legal right to the performance by the respondent of the duty which it is sought to enforce, and that nothing essential to that right will be taken by intendment."

We think an all inclusive summary of these pronouncements is the following: It is only where there is no room for controversy as to the right, and where from the facts set forth in the affidavit on which an application for a peremptory writ of mandamus is based the court can take judicial knowledge that a valid excuse is impossible, that a writ may issue without notice.

The defendant by the first assignment of error insists that the issuance of the writ in this case was contrary to this principle and that the writ is therefore void. It insists that the petition and affidavit do not preclude the existence of a valid excuse or excuses for the failure of the defendant to perform that which the plaintiff seeks to compel. In fact it points in its brief to questions of law and of fact which it contends require consideration and determination before the court could decide upon the propriety of the issuance of a writ of mandamus.

The questions suggested are: Were General Orders Nos. 6 and 11 violated as alleged? Did the destruction of the defendant's track and bridge by floodwaters in 1950 constitute a violation of General Order No. 11? Can a railway company change a freight schedule without violating General Order No. 11? Is the plaintiff entitled to a writ of mandamus to compel the restoration of through service on the Pender line after a lapse of 6 years? Did the railway company "abandon" switches along the Pender line in violation of General Order No. 6?

Clearly two questions of fact were suggested concerning which it could not be said that there was no room for controversy or which could be determined on the basis of judicial knowledge. They were that of

whether or not General Orders Nos. 6 and 11 had been violated and that of whether or not there had been an abandonment of switches.

Obviously a possible legal controversy existed as to obligation of the defendant to restore the bridge in the light of the fact that its condition resulted from natural causes; as to whether or not the statute of limitations had any application in view of the facts alleged as to the period of the existence of the condition on which the application was based; and as to whether or not the court had any power of adjudication as to schedules. Also it is obvious that there was a possible legal and factual controversy as to whether or not abandonment had been authorized by the Interstate Commerce Commission and the effect thereof if abandonment had been so granted. This last is true in the light of the rule, concerning which there appears to be no dispute, that abandonments authorized by the Interstate Commerce Commission are binding on the states.

As pointed out in the cases cited, the question to be considered in determining whether or not a peremptory writ of mandamus should issue is not that of whether there are or were facts which would operate to defeat the relief sought by the plaintiff, but rather that of whether or not speculatively there was room or basis for controversy.

Speculation is permissible in this connection, as has been made clear by the opinion in State ex rel. Platte Valley Irr. Dist. v. Cochran, *supra*. That case was one where the propriety of the issuance of a peremptory writ of mandamus, without notice, to require release of water for irrigation was under consideration. After stating the legal principle this court, by way of illustration of its purport and effect, said: "We think the allegations of the affidavit and petition admit of controversy. In the first place, relator's appropriation can be taken only from the natural flow of the stream during the irrigation season. It is altogether possible that the

waters behind the public power company's diversion dam were accumulated during the nonirrigation season, in which relator would have no right by virtue of his appropriation. It is likewise possible that a usable quantity of water might not reach relator's headgate, even if the water were released in accordance with the writ. Other persons, not parties to the suit, might well have interests superior to those of relator, which respondents are obligated to protect. In such cases, where it is impossible for the district court to have knowledge that no valid excuse could be given for not performing the alleged duty, no power exists to issue a peremptory writ without the respondent having been notified of the pending proceedings."

The plaintiff contends substantially that the defendant may not be heard to complain that the writ was issued without notice since it had the right to move in the district court to have it set aside and to have a hearing there on its motion. The reliance in this respect rests upon State ex rel. Spillman v. Chicago & N. W. Ry. Co., 112 Neb. 176, 198 N. W. 670. This case does not support the contention.

In that case a peremptory writ of mandamus was issued without notice in an original action in this court. By recital in the opinion in that case it appears that the propriety of the issuance of the writ was attacked by motion and that evidence was submitted, the order modified, and the motion to vacate the peremptory order was overruled. There is nothing in the opinion the effect of which is to say that the defendant in a case wherein a peremptory writ of mandamus has been issued without notice waives the right of appeal from the issuance of the writ by failure to seek to have it set aside by the court which issued it.

The conclusion reached in the light of these observations is that, as contended by defendant, the court erred in issuing the peremptory writ of mandamus without

notice. This conclusion renders unnecessary a consideration of the other assignments of error.

It follows that the judgment of the district court should be and it is reversed.

REVERSED.

SALVATORE CARUSO, APPELLANT, V. WALTER MOY ET AL., APPELLEES.

81 N. W. 2d 826

Filed March 15, 1957. No. 34055.

1. **Cancellation of Instruments: Fraud.** Equity may decree cancellation or rescission of a contract for fraud or misrepresentation constituting an inducement to its execution, especially when the legal remedy is inadequate or the equitable relief by way of cancellation is more complete.
2. **Contracts.** The rescission of a contract must be in toto and the parties must be placed in status quo as far as the circumstances will permit.
3. ———. It is a general and well-established rule that there can be no rescission of a contract unless the parties can be placed in status quo, or substantially so.
4. **Contracts: Fraud.** Whether the right of one party to a contract to rescind the same arises on account of fraud inducing the contract or on account of a breach by the other party of a dependent covenant, such right is barred by failure of the one party, for an unreasonable time after knowledge of the facts giving rise to such right, to declare a rescission and disclaim the benefits of the contract.
5. **Equity.** The question whether laches exists in a particular case depends upon its own peculiar circumstances and is addressed to the sound discretion of the court, the question of the unreasonableness of the delay depending largely upon the nature of the property in the particular case.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed.*

Martin A. Cannon, Jr., and *Matthews, Kelley & Delehant*, for appellant.

Hotz & Hotz, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for Douglas County. Salvatore Caruso brought an action in the district court against Walter Moy and Anna Moy for the purpose of having declared void a contract for the purchase of a restaurant by him from the Moys on the ground that the Moys induced him to enter into the contract by fraud. The trial court denied plaintiff the relief he prayed for, that is, that the defendants be required to return to him all money he had paid defendants on the purchase price, and dismissed his petition. His motion for new trial having been overruled, plaintiff took this appeal therefrom.

This is an action in equity for the rescission of a contract for the sale of a restaurant business. The action, being equitable in character, is triable de novo. See, § 25-1925, R. R. S. 1943; Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131. We shall apply the usual principles applicable in such cases. These principles have been stated by this court so often that no useful purpose would be served by restating them.

On October 13, 1954, appellant entered into an agreement with appellee Walter Moy, whom we shall hereinafter refer to as Moy, for the purchase of a restaurant owned by Moy located at 2219 Military Avenue in the city of Omaha known as the "Ming Toy Cafe." The building in which it was located was owned by Mrs. Frank Tribulato. The restaurant was of a family type, with a dining room capacity for about 175 patrons, and served American-Chinese foods. Appellees had been successfully operating it for some 12 years.

The consideration for the purchase of the restaurant was $18,000. Appellant paid $8,000 of this amount in cash at the time of purchase, obligated himself for $8,768 thereof by giving an installment note to Moy secured

by a chattel mortgage upon the furniture and fixtures in the restaurant, and for the rest assumed and agreed to pay the balance of $1,232 owing on the air-conditioner in the restaurant. The latter was payable at the rate of $56 per month. In addition to the foregoing purchase price appellant assumed the lease obligation for the premises in which the restaurant was located, which was $300 per month. The lease appellee Moy had on the premises was for 5 years and expired on June 16, 1957. Appellant went into immediate possession. He thereafter operated the business as an American-Italian restaurant. He did so until November 1, 1955, when he was closed by the Omaha-Douglas County Health Department. However prior thereto he had started this suit, doing so on August 9, 1955.

The fraud complained of by appellant is set forth in his petition as follows:

"III In order to induce plaintiff to purchase said business and lease said premises, defendants and each of them represented to the plaintiff that the said restaurant was in good condition, and particularly represented to the plaintiff that the condition of the said restaurant was satisfactory to the Omaha-Douglas County Health Department. In this connection defendants displayed to the plaintiff a current operating permit from the said Department, and certified that the restaurant was satisfactory as recited therein.

"IV The said representations were in fact false as said defendants well knew; the said restaurant was not in good condition and defendants had, in August of 1954, by the said Health Department, been advised that the said permit would not be renewed in 1955 unless extensive repairs and replacements were made therein, and had enumerated among other, the following deficiencies to defendants: 1. The dishwashing system had an inadequate hot water supply. 2. The stove had an unsatisfactory venting system. 3. The kitchen floor was of unsatisfactory material. 4. The kitchen walls and

ceiling were improperly painted. 5. The air conditioner drained into the men's restroom rendering said room unsatisfactory. 6. The kitchen lighting and ventilation were unsatisfactory. In addition to the foregoing the plumbing and water pipes in said restaurant were old and rusty with numerous leaks and required extensive repairs and the roof leaked water onto the stove.

"V All of said defects and the prospective cancellation of the said permit were known to the defendants, and each of them, at the time they induced plaintiff to purchase said business and lease said premises. Defendants fraudulently refrained from disclosing said defects to the plaintiff but made the false representations aforesaid to the plaintiff to induce him to purchase and lease said property. Had plaintiff known of said defects or the falsity of defendants' representations he would not have purchased said restaurant and he relied upon the truthfulness and completeness of the defendants' false representations and was thereby induced to purchase the said business and lease said premises."

We said in Russo v. Williams, *supra:* "A party who has been induced to enter into a contract by fraud has, upon its discovery, an election of remedies. He may either affirm the contract and sue for damages or disaffirm it and be reinstated to the position he was in before it was consummated. Rayburn v. Norton, 117 Or. 328, 243 P. 560."

As stated in 55 Am. Jur., Vendor and Purchaser, § 593, p. 986, and cited in Russo v. Williams, *supra,* with approval: "* * * equity may decree cancellation or rescission of a contract for fraud or misrepresentation constituting an inducement to its execution, especially when the legal remedy is inadequate, or the equitable relief by way of cancellation is more complete."

"Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence." Russo v. Williams, *supra.*

"The general rule that fraud is not presumed, but must

be proved by the party who alleges it, does not mean that it cannot be otherwise proved than by direct and positive evidence. Fraud in a transaction may be proved by inferences which may reasonably be drawn from intrinsic evidence respecting the transaction itself, such as inadequacy of consideration, or extrinsic circumstances surrounding the transaction." Trebelhorn v. Bartlett, 154 Neb. 113, 47 N. W. 2d 374.

"To maintain an action for rescission because of false representations the party seeking such relief must allege and prove what representations were made; that they were false and so known to be by the party charged with making them or else were made without knowledge as a positive statement of known fact; that the party seeking relief believed the representations to be true; and that he relied and acted upon them and was injured thereby." Russo v. Williams, *supra.*

"Where fraud or misrepresentation is material with reference to a transaction subsequently entered into by a person deceived thereby, it is assumed in the absence of facts showing the contrary that it was induced by the fraud or misrepresentations." Pasko v. Trela, 153 Neb. 759, 46 N. W. 2d 139.

"Fraud may consist in words, acts, or the suppression of material facts with the intent to mislead and deceive." Pasko v. Trela, *supra.*

As said in Restatement, Contracts, § 470, p. 890, and cited in Pasko v. Trela, *supra,* with approval: "(1) 'Misrepresentation' in the Restatement of this Subject means any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts."

" 'One of the essential elements of fraud practiced by means of false representations is that the representation must be concerning a matter material to the contract.' Linch v. Carlson, *supra* (156 Neb. 308, 56 N. W. 2d 101)." Russo v. Williams, *supra.*

As said in Restatement, Contracts, § 470, p. 890, and

cited in Pasko v. Trela, *supra,* with approval: "(2) Where a misrepresentation would be likely to affect the conduct of a reasonable man with reference to a transaction with another person, the misrepresentation is material, except as this definition is qualified by the rules stated in § 474." The qualification has no application here.

As stated in 23 Am. Jur., Fraud and Deceit, § 144, p. 945, and cited with approval in Pasko v. Trela, *supra:* "The mere fact that one makes an independent investigation or examination, or consults with others, does not necessarily show that he relies on his own judgment or on the information so gained, rather than on the representations of the other party, nor does it give rise to a presumption of law to that effect. If, under the circumstances, he is unable to learn the truth from such examination or investigation or, without fault on his part, does not learn it and in fact relies on the representations, he is entitled to relief, all other ingredients of liability being present. It is well settled that where the representee makes only a partial investigation, relies in part upon the representations, and is deceived by such representations to his injury, he may maintain an action for such deceit or secure appropriate equitable relief. Furthermore, no right is affected by an investigation which confirms the representations."

However, "The rescission of a contract must be in toto and the parties must be placed in status quo so far as the circumstances will permit." Bennett v. Emerald Service, Inc., 157 Neb. 176, 59 N. W. 2d 171.

We shall, for the purpose of what is hereinafter said, assume the allegations of appellant's petition are true and that, under the principles hereinbefore stated, they would constitute valid grounds for rescission. However, it should be understood we do not so hold. The question is, can appellant maintain such an action under the circumstances established by the evidence adduced?

Basically, as stated in Russo v. Williams, *supra*: " 'It

is a general and well-established rule that there can be no rescission of a contract unless the parties can be placed in statu quo or substantially so.' Perry v. Meyer, 110 Neb. 347, 193 N. W. 717." See, also, Bennett v. Emerald Service, Inc., *supra.*

We said in Russo v. Williams, *supra:*

" 'Whether the right of one party to a contract to rescind the same arises on account of fraud inducing the contract or on account of a breach by the other party of a dependent covenant, such right is barred by failure of the one party, for an unreasonable time after knowledge of the facts giving rise to such right, to declare a rescission and disclaim the benefits of the contract.' Platner v. Ellingwood, 123 Neb. 719, 243 N. W. 896. See, also, Sipola v. Winship, *supra* (74 N. H. 240, 66 A. 962); Rayburn v. Norton, *supra;* Rasmussen v. Hungerford Potato Growers Assn., 111 Neb. 58, 195 N. W. 469.

" 'If the purchaser has knowledge of the grounds upon which he is entitled to rescind, an unreasonable delay upon his part, especially if accompanied by such change of circumstances as makes it impracticable for him to place the vendor in statu quo, or by such acts or conduct on the part of the purchaser as constitute waiver, prevents him from exercising his right to rescind. Even where time is not of the essence of the contract, a purchaser may still lose his right to rescind by delaying action to a time, which under the circumstances, is unreasonable.' 66 C. J., Vendor and Purchaser, § 476, p. 824.

" 'The question whether laches exists in a particular case depends upon its own peculiar circumstances and is addressed to the sound discretion of the court, the question of the unreasonableness of the delay depending largely upon the nature of the property in the particular case.' 66 C. J., Vendor and Purchaser, § 477, p. 825."

And in Rasmussen v. Hungerford Potato Growers Assn., 111 Neb. 58, 195 N. W. 469: "* * * he who rescinds

must act promptly. Immediately upon learning the facts he should announce to his adversary that he does not intend to be bound by the terms of the agreement made, and tender back what he has received under it. To maintain rescission at law, he must do this at or prior to the time of the commencement of his action. Due allegation of his acts of rescission should be made in the petition."

While we think appellant's petition was deficient, and did not state a cause of action in rescission, we shall here consider it as if it did as the case was apparently tried on that theory. Appellant adduced evidence to the effect that on August 13, 1954, the appellees were advised by an inspector of the Omaha-Douglas County Health Department that they would have to make certain changes in their restaurant, consisting of putting in a new floor in the kitchen, installing adequate new dishwashing facilities, and installing a new ventilating system in the kitchen, if their restaurant was to be permitted to continue to operate; that appellees did not comply with these requirements but advertised and sold the restaurant to appellant without advising him thereof; that on June 20, 1955, appellant was advised of these requirements by the health department but did not know the appellees had also been so advised until July 1955; and that he brought this action on August 9, 1955. Although he brought this action on August 9, 1955, the record does not establish the fact that he ever tendered the restaurant to appellees or either of them. In fact the record shows he continued to operate the restaurant after he brought the action and refused to turn it over to appellees after it was closed on November 1, 1955, by the health department, keeping possession thereof until November 15, 1955, to which date appellant had paid the rent. Appellant then took the keys to the restaurant to appellees' home and gave them to Moy saying, "I finished, I give you keys." Under this situation we do not think appellant is entitled to a re-

scission because he held and operated the restaurant for too long a period after he knew of what he now claimed was fraud. He should not only have brought the action but should have tendered the restaurant to appellees Moy. No place in his petition nor in his evidence does he say that he ever did so.

There is another reason why rescission should not be allowed. Appellant took over the restaurant as a prosperous and going enterprise dealing in American-Chinese foods. He changed the bill of fare to American-Italian, made some substantial changes in the restaurant itself, and called it "Caruso's." He and his family, completely inexperienced, tried to run it. Due to poor housekeeping and many other causes the business gradually fell off until in October 1955, the last month it was operated, it was less than half of what it had formerly been. The record establishes that the appellees could not be placed in status quo, in fact, when they obtained possession on November 15, 1955, the business had been closed for over 2 weeks and the fixtures and furnishings therein were in poor condition. To require appellees, under such circumstances, to take back the restaurant and return to appellant all payments they had received from him would permit the appellant to perpetrate a fraud on them for appellant kept possession thereof just as long as he could, long after he knew of what he now claims was fraud. He did this by getting extensions of time from the health department in which to meet its requirements, although apparently never intending to comply therewith. Finally the health department realized that fact and thereafter refused to extend the time and, as of November 1, 1955, closed the restaurant.

Appellant seems to think he should be entitled to recover because he was permitted to amend his petition at the time of the trial to the effect that, "All of said property and premises have been returned to defendant." We have already stated when and the conditions under which Moy accepted the keys to the restaurant. At

that time it was closed, the condition of the premises was bad and needed care, the time of the year required the premises to be heated in order to protect the fixtures and furnishings from being damaged by freezing, and the appellees were personally liable on the lease and conditional sales contract covering the air-conditioning. Under this situation and these conditions the appellees had a perfect right to take possession of the property in order to protect their interests, as the chattel mortgage provided they could, and go in and open up the business.

Appellant endeavored to show, on a hearing relating to a second motion for new trial, that appellees had, subsequent to trial, made the changes required by the health department. In view of what we have held we do not think that fact material. Whether or not appellant has a good cause of action at law for damages we do not here decide. However, considering the nature of the items required, and the cost of installing them, we think appellant had and has an adequate remedy at law if he has actually been defrauded and damaged thereby. It is not a factual situation such as was presented in Russo v. Williams, *supra,* where we came to the conclusion the facts entitled the appellants therein to some form of relief in that action.

In view of the foregoing we have come to the conclusion that the judgment of the trial court should be affirmed.

AFFIRMED.

CHAPPELL, J., participating on briefs.

IN RE REDISTRICTING OF SCHOOL DISTRICTS NOS. 11, 26, 33, 37, 28, 106, AND 137, LINCOLN COUNTY, NEBRASKA. GAYLORD CLAUSEN ET AL., APPELLANTS AND CROSS-APPELLEES, V. SCHOOL DISTRICT NO. 33, LINCOLN COUNTY, NEBRASKA, APPELLANT AND CROSS-APPELLEE, IMPLEADED WITH SCHOOL DISTRICT NO. 37, LINCOLN COUNTY, NEBRASKA, APPELLEE AND CROSS-APPELLANT.

IN RE REDISTRICTING OF SCHOOL DISTRICTS NOS. 11, 26, 33, 37, 28, 106, AND 137, LINCOLN COUNTY, NEBRASKA. ORSON COVILLE, APPELLANT AND CROSS-APPELLEE, V. SCHOOL DISTRICT NO. 37, LINCOLN COUNTY, NEBRASKA, APPELLEE AND CROSS-APPELLANT.

81 N. W. 2d 822

Filed March 15, 1957. Nos. 34101, 34110.

1. **Appeal and Error: Parties.** The real party in interest in a proceeding in error to reverse the action of the county superintendent in creating a new district or changing the boundaries of districts in the case of changes affecting a city, village, or Class III school district is the school board or board of education of the district affected.
2. ———: ———. The real parties in interest in a proceeding in error to reverse the action of the county superintendent in creating a new district or changing the boundaries of districts in case of changes affecting districts other than city, village, or Class III school districts are the petitioners who signed the petitions for change of boundaries or new district creation.
3. ———: ———. In a proceeding in error the summons must be served upon the real party or parties in interest or the attorney of record of the defendant or defendants in error, unless the issuance or service is waived in writing by the attorney or the defendants.
4. ———: ———. In a proceeding in error all necessary parties must be made parties to the proceeding.
5. ———: ———. All parties in a joint judgment are necessary parties to a proceeding in error brought to reverse such judgment.
6. ———: ———. The failure to make all parties who may be affected by the modification or reversal of a judgment in a proceeding to review the cause by petition in error is ground for dismissal of the petition.
7. ———: ———. One necessary party who has been properly served with summons in a proceeding in error may properly

move for dismissal of the petition for failure to make others parties to the proceeding.

APPEAL from the district court for Lincoln County: JOHN H. KUNS, JUDGE. *Affirmed.*

Halligan & Mullikin and *Sam S. Diedrichs,* for appellants.

Baskins & Baskins, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

A knowledge of the background for the proceedings leading up to the appeal which is before this court is essential to an understanding and determination of the issues involved.

On February 17, 1956, pursuant to the provisions of section 79-402, R. S. Supp., 1955, a petition containing the names of more than 55 percent of the legal voters of school district No. 33 in Lincoln County, Nebraska, was filed with the county superintendent requesting the creation of a new district or a change of boundaries so that this district and school district No. 37 should be bounded as one district. The following named districts, on the dates set opposite the names, filed like but separate petitions: School district No. 137, February 17, 1956; school district No. 11, February 20, 1956; school district No. 26, February 21, 1956; school district No. 106, February 21, 1956; and school district No. 38, February 24, 1956.

On February 25, 1956, six petitions by the school board of school district No. 37, pursuant also to the provisions of section 79-402, R. S. Supp., 1955, were filed with the county superintendent requesting the creation of a new district or a change of boundaries so that school districts Nos. 33, 137, 11, 26, 106, and 38 would be included in school district No. 37. The petitions applied separately and independently to the other six districts.

Following the filing of the six petitions, on February 28, 1956, the county superintendent directed the issuance of notice and set March 14, 1956, at 10 a.m., as the date of hearing.

On March 14, 1956, Orson Coville, also named as Orson Covell, filed objections to the hearing and to consolidation of school districts Nos. 11 and 33 with school district No. 37. In his objections he recites that he is a legal voter in school district No. 11 and that his objections are made on his own behalf and on behalf of other voters similarly situated. His prayer relates to school district No. 11.

On the same date Gaylord Clausen and Frank McConnell filed like objections to the consolidation. These were, according to recital, made by them as qualified voters and electors of school district No. 33.

Also on the same date Lynn McConnell and Melvin Bayne as chairman and secretary of the school board of school district No. 33 filed objections to the consolidation.

On April 16, 1956, the county superintendent entered an order sustaining the various petitions by which the boundaries of school district No. 37 were extended to include the other six districts.

Thereafter on May 15, 1956, the objectors above named in the capacities described filed jointly a petition in the district court for Lincoln County, Nebraska, the object and purpose of which was to have vacated and set aside the order of redistricting and consolidation rendered by the county superintendent. At the same time a praecipe for summons in error as follows was filed: "You are hereby requested to issue Summons in Error in the above entitled cause returnable as provided by law."

A summons was issued to the sheriff commanding service upon the seven school districts. Summons was not issued for any other parties. The summons was served upon Charles W. Baskins, attorney for school district No. 37. As to each of the others, it was served on

the chairman of the board. Service was made on May 15, 1956.

On May 21, 1956, school district No. 37 filed a motion to dismiss the petition in error for the reason that no summons was issued for or served upon the real parties in interest in school districts Nos. 11, 26, 33, 38, 106, and 137, who were the persons who had in these districts filed the petitions for consolidation.

The court found that the real parties in interest insofar as the proceeding in error was concerned were the petitioners in school district No. 11 and in school district No. 33. Accordingly the motion was sustained and the petition in error was dismissed.

From this order as it relates to school district No. 33, Gaylord Clausen, Frank McConnell, Melvin Bayne, and Lynn McConnell have taken an appeal to this court. This appeal is docketed in this court under the number 34101. These named parties are the appellants in this case.

From the same order as it relates to school district No. 11, Orson Coville has taken an appeal. This appeal is docketed under the number 34110. Orson Coville is appellant in this case. The issues in the two appeals are in no wise different. In this light one opinion will be written in disposition of the two appeals. The seven school districts were the defendants in the petition in error in the district court in consequence of which they are appellees here in the two cases. An attempt was made to make school district No. 33 an appellant herein but this was ineffective for reasons which will become apparent later herein. Although all of the districts are nominally appellees the dismissal was based on the conclusion that the petitioners of school districts Nos. 11 and 33 were the real parties in interest. In view of this these two districts and school district No. 37 will be treated hereinafter for the purpose of consideration of the case as appellees.

At this point it should be said that as to school dis-

trict No. 37 the school board was the proper petitioner, it being within the designation of a city or village school district, and accordingly was a proper defendant in error in the district court. Also it was properly served with summons in the proceeding in the district court. The summons was served upon the attorney for the district. As to the petition for creation of new districts from other districts or change in boundaries of such districts, the following appears in section 79-402, R. S. Supp., 1955: "Provided, changes affecting cities, villages, or Class III school districts may be made upon the petition of the school board or board of education of the district or districts affected."

By inference, although not directly, section 25-1904, R. R. S. 1943, indicates that service of summons in an error proceeding may be served on the attorney of record. It provides: "The summons * * * shall, * * * be issued * * * to the sheriff of any county in which the defendant in error or his attorney of record may be; * * *. The defendant in error, or his attorney, may waive in writing the issuing or service of the summons." In any event neither party appears to contend that school district No. 37 was not properly before the district court as a defendant in the error proceeding.

The motion to dismiss was one proper to be made by school district No. 37, a defendant properly served with summons. Hendrickson v. Sullivan, 28 Neb. 790, 44 N. W. 1135, was a case wherein a proceeding in error came to this court to reverse a finding in favor of two joint defendants. Service of summons was had against but one. Motion to dismiss was made by the one served. The motion was sustained.

Under the decisions of this court it becomes clear that in a proceeding in error in a court to review the decisions of an inferior tribunal all necessary parties must be made parties and served with summons, unless as has been pointed out this has been waived. In Hendrickson v. Sullivan, *supra,* it was said: "All the parties in a joint

judgment are necessary parties to proceedings in error brought to reverse such judgment, and must be made so, as either plaintiffs or defendants in error."

In Barkley v. Schaaf, 110 Neb. 223, 193 N. W. 267, it was said: "All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court." This statement was quoted with approval in Castek v. Tully, 127 Neb. 657, 256 N. W. 506, and Donisthorpe v. Vavra, 134 Neb. 157, 278 N. W. 151.

These pronouncements were made in proceedings in error from the district court to the Supreme Court but the rule is not different in a proceeding in error from an inferior tribunal to the district court. In the case of In re Estate of Berg, 139 Neb. 99, 296 N. W. 460, it was said: "All parties interested in a matter heard before the county court in the exercise of probate jurisdiction, who may be affected by the modification or reversal of a final order of said court, must be made parties in a proceeding to review said matter by error proceedings in the district court." See, also, Cacek v. Munson, 160 Neb. 187, 69 N. W. 2d 692; § 25-1901, R. R. S. 1943.

In this light it becomes necessary to ascertain who were the necessary parties to the error proceeding in the district court. Reference for this purpose must first be had to the wording of section 79-402, R. S. Supp., 1955, to the extent that it applies to school districts Nos. 11 and 33, as follows: "The county superintendent shall create a new district from other districts, or change the boundaries of any district upon petitions signed by fifty-five per cent of the legal voters of each district affected."

It is to be observed that in this no power to effect the purpose contemplated is conferred upon or vested in the school district as an entity or any of its officers. The power contemplated to effect these purposes is conferred solely and alone upon the qualified voters by petition. Attention has not been called to any other provision or

provisions, and we have found none, which give the district or any of its officers any control over the power and authority thus conferred upon the voters.

Chapter 79, subdivision I, section 4, Comp. St. 1887, contains the following: "The county superintendent shall not refuse to change the boundary line of any district, or to organize a new district when he shall be asked to do so by a petition from each school district affected, signed by two-thirds of all the legal voters in such district." The foregoing quotation from section 79-402, R. S. Supp., 1955, has by amendatory action of the Legislature evolved from this provision of the statutes of 1887.

As to this provision of the statutes of 1887 in relation to parties to a proceeding to change boundaries or organize a new district, this court in Cowles v. School District, 23 Neb. 655, 37 N. W. 493, said: "The laws of this state, as well by policy as by letter, have left the control of the boundaries of school districts, primarily, with the legal voters of each district respectively. * * * After the first or original organization of a new county into one or more school districts, no new district can be formed, old one altered, or the boundaries of any altered, without the movement therefor originating with the legal voters thereof, and their will to that effect being expressed by petition of the strength prescribed by statute. These are matters with which the school district, as a corporation, or quasi corporation, has been vested with neither power nor duty, nor has any district officer, board, or school meeting; but they rest with the voters in their capacity of petitioners, and with them alone. These voters have not complained."

These conclusions were adopted as properly interpretative of the statutes in the respects under consideration as they existed in 1950 in State ex rel. Larson v. Morrison, 155 Neb. 309, 51 N. W. 2d 626. In these respects the statutes were not different in 1956. See, also, School District v. Wheeler, 25 Neb. 199, 41 N. W. 143; School

District No. 67 v. School District No. 24, 55 Neb. 716, 76 N. W. 420.

It becomes clear therefore that the petitioners in school districts Nos. 11 and 33 were the real parties in interest and necessary parties to a proceeding to review the action of the county superintendent in ordering the change of boundaries and consolidating the two districts with school district No. 37, and since it appears that they were not made parties and that service of summons was not had upon them, the motion to dismiss the petition in error was properly sustained. The order of the district court dismissing the petition in error is therefore affirmed.

AFFIRMED.

IN RE APPLICATION OF FERGUSON TRUCKING CO., INC. FERGUSON TRUCKING COMPANY, INC., APPELLEE, V. ROGERS TRUCK LINE ET AL., APPELLANTS, WILBUR F. GETTEL, INTERVENER-APPELLANT.

81 N. W. 2d 915

Filed March 22, 1957. No. 34063.

1. **Public Service Commissions.** Rule 4.6 of the Rules of Practice and Procedure before the Nebraska State Railway Commission applies generally to applications, made to the commission as such, for a continuance prior to the beginning of a hearing. It is not applicable to ordinary motions for continuances during a hearing before an examiner.
2. ———. An order of the Nebraska State Railway Commission, making ultimate findings of fact in the language of the statutes, is not void because of the failure of the commission to make basic findings of fact in the order upon which the ultimate facts rest.
3. ———. Courts are without authority to interfere with the findings and orders of the Nebraska State Railway Commission except where it exceeds its jurisdiction or acts arbitrarily.
4. **Motor Carriers.** By section 75-223, R. S. Supp., 1955, a common carrier is defined as any person who or which undertakes to transport passengers or property for the general public in intrastate commerce by motor vehicle for hire, whether over

regular or irregular routes, upon the highways of this state.

5. **Carriers.** At common law, so far as its vocation is concerned, a common carrier is one which holds itself out to the public as a carrier always open to employment for the transportation of persons or freight, and that it will carry for all persons indiscriminately.
6. ———. Carriage for all persons indiscriminately is implicit in the statutory definition of a common carrier.
7. **Public Service Commissions: Motor Carriers.** The declared policy of section 75-222, R. R. S. 1943, is to regulate transportation in the public interest, and to promote efficient service without undue preferences or advantages, and unfair or destructive competitive practices. The declared policy does not condemn competition. It does condemn unfair or destructive competitive practices.
8. **Public Service Commissions: Public Utilities.** This court has no power to regulate public utilities. Its function on appeal is limited to an examination of the jurisdiction of the railway commission over the subject matter and a determination of whether or not the order made by the railway commission is reasonable as distinguished from arbitrary action. The policy or wisdom of its action cannot be reviewed by the courts where the foregoing requirements to lawful action are found to exist.

APPEAL from the Nebraska State Railway Commission: *Affirmed.*

Martin, Davis & Mattoon and *J. Max Harding,* for appellants.

Robert S. Stauffer, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an appeal from the Nebraska State Railway Commission, hereinafter referred to as the commission. The commission granted a certificate of convenience and necessity to Ferguson Trucking Company, a corporation, hereinafter called applicant. A number of certificate holders protested the granting of the certificate. Only a part of them offered evidence before the examiner. They will be referred to as the protestants or by

name. Protestants' assignments of error will be set out as they are determined herein.

We affirm the order of the commission.

The authority granted the applicant was for:

"SERVICE AUTHORIZED: (1) Machinery, equipment, materials and supplies used in connection with the discovery, development, production, refining, manufacture, processing, storage, transmission, and distribution of natural gas and petroleum and their products and by-products; and (2) Machinery, materials, equipment and supplies used in or in connection with the construction, operation, repair, servicing, maintenance and dismantling of pipe lines, including the stringing and picking up thereof.

"ROUTE OR TERRITORY AUTHORIZED:

Between points and places within the state of Nebraska over irregular routes. * * *."

The application of Ferguson Trucking Co., Inc., was filed February 24, 1955. Protests were filed by Peake, Inc., Charles D. Doher, Wheeler Transport Service, Inc., Rogers Truck Line, L. E. Whitlock Truck Service, Inc., Burel F. Kinney, Walter A. Joy, Lewis Coombes, Joy and Coombes, and Herbert L. Johnson.

The matter was set for hearing before an examiner at Sidney, Nebraska, on April 15, 1955. Appearances were made for protestants Rogers, Whitlock, Kinney, Joy, Coombes, and Johnson. Also an appearance was made for Wilbur F. Gettel "as intervener in opposition." The transcript shows no pleading by or in behalf of Gettel.

On April 16, 1955, the second day of the hearing, applicant moved for a continuance to a future date to be fixed by the commission.

Protestants resisted on the basis of noncompliance with rule 4.6 of the commission. There was considerable argument about additional absent witnesses for the applicant, protestants offering evidence out of order, and matters of that kind. Finally the examiner continued the hearing on his own motion. The hearing was later

set for July 21, 1955. The hearing proceeded at that time.

Protestants assign the order of continuance as prejudicial error. They contend that it is in violation of rule 4.6 of the Nebraska State Railway Commission. That rule is: "Any party who desires a continuance shall, immediately upon receipt of notice of the hearing, or as soon thereafter as facts requiring such continuance come to his knowledge, notify the Commission in writing of said desire, stating in detail the reasons why such continuance is necessary. Any such party may be required to submit affidavits in support of such request. The Commission, in passing upon a request for a continuance, shall consider whether such request was promptly made. For good cause shown, the Commission may grant such a continuance and may at any time order a continuance on its own motion. Only under exceptional circumstances will requests for continuance of a hearing be considered unless submitted at least seven days prior to the hearing date."

We think it patent that the rule applies generally to applications made to the commission, as such, for a continuance prior to the beginning of a hearing. We find nothing in the rule that makes it applicable to ordinary motions for continuances during a hearing before an examiner.

We find nothing in the record that would sustain a finding of prejudice to the protestants based upon the continuance granted. Protestants argue that due to the rapid fluctuation of the oil industry that the evidence submitted at the first hearing was of no value when the record was finally completed. The evidence which they state was of "no value" was that of the applicant. On July 21, 1955, at the request of counsel for some of the protestants and by agreement with counsel for the applicants and other protestants, the matter was again continued. Hearings were again had on August 15 and 16, 1955. No claim of prejudice is shown because

of that continuance. We find no merit in the assignment.

Section 75-230, R. R. S. 1943, provides as follows: "Subject to section 75-237, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing and able properly to perform the service proposed, and to conform to the provisions of sections 75-222 to 75-250 and the requirements, rules and regulations of the State Railway Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."

Section 75-225, R. R. S. 1943, provides that an examiner is authorized to hold hearings, administer oaths, and make recommendations.

The examiner reported to the commission that, in his opinion, the applicant was fit, willing, and able to properly perform the proposed service. He further reported that the applicant had failed to prove that a present or future public need exists for the proposed service and recommended that the application be denied. This recommendation was based on his finding that neither the present nor future public convenience and necessity required the service. Applicant filed exceptions to the examiner's report specifically directed to the finding as to public convenience and necessity, and asked that the examiner's report be overruled and that the application be granted.

The commission considered the matter and held: "The conclusions of the Commission differ from those of the Examiner in his report and recommendation. It is the opinion of the Commission that the evidence adduced at the hearing on the subject application substantiates a finding that the services of presently authorized oil field equipment carriers are not adequate to fulfill the

transportation requirements of an expanding oil and gas industry in Nebraska. The Commission is of the opinion that the present and future public convenience and necessity require the service proposed by the instant application."

The commission then found that the present and future public convenience and necessity required the proposed service and that the applicant was fit, willing, and able properly to perform the proposed service. It ordered the issuance of the certificate.

Motions for reconsideration were filed by protestants and overruled.

The commission findings as to both the fit, willing, and able qualifications of the applicant, and as to public convenience and necessity, are challenged here.

Both findings of the commission are substantially in the language of the statute.

In In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418, we held that the failure of the commission to find a willful failure to comply with the provisions of the act rendered the order irregular and void. The order involved was set aside. The requirement of "willful failure" was specified in the act (now section 75-238, R. R. S. 1943).

We are now asked to extend the effect of that decision so as to require a finding of basic facts in the order as a foundation for the finding of the ultimate fact required by the statute. Because of the absence of a finding of basic facts we are urged to hold the commission's order to be void.

The contentions of the protestants in that regard are best set out in Saginaw Broadcasting Co. v. Federal Communications Comm., 96 F. 2d 554.

There the court held: "In discussing the necessary content of findings of fact, it will be helpful to spell out the process which a commission properly follows in reaching a decision. The process necessarily includes at least four parts: (1) evidence must be taken and

weighed, both as to its accuracy and credibility; (2) from attentive consideration of this evidence a determination of facts of a basic or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred, or not, as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion."

The court then held: "* * * findings of fact, to be sufficient to support an order, must include what have been above described as the basic facts, from which the ultimate facts in the terms of the statutory criterion are inferred."

The court in reaching this conclusion relied on a number of decisions of the United States Courts which are discussed somewhat at length in the opinion. The court also referred to "decisions of state courts" which supported its conclusion. The decision cited and quoted from is Kewanee & Galva Ry. Co. v. Illinois Commerce Comm., 340 Ill. 266, 172 N. E. 706.

However, in the recent case of Antioch Milling Co. v. Public Service Co., 4 Ill. 2d 200, 123 N. E. 2d 302, the Supreme Court of Illinois held that the decision above cited was "based on an express statutory command" and refused to set aside an order where specific findings of fact were not made, there being no statute requiring such findings.

We find no statute in Nebraska that makes such a requirement as protestants urge upon us. Protestants cite none. In 146 A. L. R. 209 and following, is a note which indicates something of the confusion of issues that would follow the adoption of such a rule.

In Saginaw Broadcasting Co. v. Federal Communications Comm., *supra*, the court held: "When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence. In the

absence of findings of fact the reviewing tribunal can determine neither of these things. * * * a reviewing court cannot properly exercise its function upon findings of ultimate fact alone, but must require also findings of the basic facts which represent the determination of the administrative body as to the meaning of the evidence, and from which the ultimate facts flow."

We have found no such difficulty in our review of the records on appeal from the commission. We decline to undertake to place such a requirement on the commission.

Protestants assign error in the finding of the commission that applicant was fit, willing, and able to perform the service in that it was made "without knowing who owned or controlled said applicant corporation." This information was not furnished by applicant in the authorized form provided by the commission. The application did have attached to it a certified copy of its articles of incorporation. The articles recite the authorized capital stock of the corporation, the amount of the capital stock with which it shall commence business, and that its president had subscribed for 2,248 shares and named the other two incorporators as shareholders, each of whom had subscribed for one share of stock. The sufficiency of the application was not challenged by protestants in their pleadings.

Applicant's president testified that he held all but two shares of the outstanding stock; that the stockholders and directors had not changed since the organization of the corporation; that he was then negotiating a sale of a minority of the stock; and that if the sale were completed the directors and officers of the corporation would not be changed. This testimony stands unchallenged. The assignment is without merit.

This brings us to protestants' assignments of error directed to the sufficiency of the evidence to sustain the commission's order. The rule is: "Courts are without authority to interfere with the findings and orders of the

Nebraska State Railway Commission except where it exceeds its jurisdiction or acts arbitrarily." Johnson v. Peake, 163 Neb. 18, 77 N. W. 2d 670.

The challenge is directed to three alleged insufficiencies of the evidence: (1) That there was no showing that the proposed service of applicant would serve a useful purpose responsive to a public demand or need; (2) that the applicant failed to prove that the alleged need could not be served as well by existing carriers; and (3) that no consideration was given to the effect of the grant of the application upon the services of existing carriers.

We state the evidence which was before the commission, and consider and determine each of these matters.

The certificate granted the applicant involves the movement of heavy commodities and equipment used in the oil industry, and particularly that of drilling and production. Some of the commodities so involved can be moved by standard light and heavy duty equipment. Other commodities require specially built equipment designed to move large and quite heavy articles. It involves also the movement of oil drilling rigs and accessory supplies and articles. The movement of an oil rig from one location to another does not involve merely the loading, hauling, and unloading of the heavy equipment. It seems that the carrier is expected to supply and does supply personnel and some of the machinery on trucks that is used in tearing down, loading, and reerecting a rig at a new location. It is a specialized service requiring expensive equipment and trained personnel. It not only involves trained employees, but employees that are reasonably compatible and able to work with shipper employees. It is a type of common carrier service that requires prompt service to the shipper. Because of the fact that a drilling contractor never is certain when he may strike oil or a dry well, he accordingly is often unable to determine in advance the exact time when shipper service will be required. Likewise, due

to meeting lease requirements as to starting of drilling time, contractors are often required to dismantle, move, and set up rigs in a quite expeditious time. Delays in any event are expensive. The evidence is that it costs a drill operator from $600 to $1,000 a day for the time a rig is not in operation while moving from location to location. The evidence also is that from 12 to as high as 20 of these trucks of all descriptions are necessary to expeditiously move a big rig at one time.

Several of the major oil companies are now operating in the Cheyenne, Kimball, and Banner County area. The oil production is an expanding business in those counties. Applicant's evidence is that several of these companies had requested that it secure a certificate so that it could serve them in Nebraska as it had in other states.

The applicant is a New Mexico corporation. It holds interstate authority in eight states. It maintains a terminal at Fort Morgan, Colorado. It proposes to locate a terminal at Kimball, Nebraska, and has new and proper equipment available for Nebraska use. There is no question about the ability of applicant to serve the Nebraska shippers based on financial worth, equipment, and trained employees. Several shippers testified to satisfactory service that they have had from applicant in other states and as to their desire that it be granted a Nebraska certificate.

Three of the protestants offered testimony in opposition to the granting of the certificate.

Joy has headquarters at Falls City in southeastern Nebraska. He has four regular employees and four trailers which he owns. He testified that he had on lease six other tractors and trailers but that he had never seen them. He testified that during the hearing he had verbally leased a terminal at Kimball but had never seen the leased property. It is obvious that he cannot furnish the specialized extensive equipment service which shippers have a right to expect.

Whitlock maintains a terminal at Sterling, Colorado.

He has rendered satisfactory carrier service in Nebraska. His witness frankly stated that there is not enough business in Nebraska to justify the expense of establishing a terminal in this state. Sterling is over 30 miles from Sidney and 85 miles from Kimball, Nebraska. Obviously he does not presently propose to put himself in a position to render the full, prompt, and efficient service that the shippers require. He brings his own situation fairly within the scope of our holding in Dalton v. Kinney, 160 Neb. 516, 70 N. W. 2d 464.

The other and principal protestant is Rogers. The testimony shows that he has his headquarters and terminal at Sidney with yards at Kimball and Harrisburg. It appears that Rogers has the equipment, the resources, the experience, and trained employees required to move the large rigs in a satisfactory manner. Rogers' testimony is that in slack periods as much as 40 percent of his equipment is idle and that in peak periods sometimes 10 to 15 percent of his equipment is idle.

Shippers testified as to extensive, expensive delays in Rogers' service caused by the fact that the required equipment was in use for others. Rogers' evidence is that he is giving adequate service from his standpoint. It is obvious that he is not fully rendering the prompt efficient service that the industry requires. Rogers does not indicate a willingness to increase his equipment to the place where he can give the requisite prompt service that peak-load demand requires.

Shippers testified that the volume of business in the industry and its demands were such that more than one fully adequate carrier in the field was a necessity. One shipper went to the extent of saying that his company might find it necessary to purchase equipment for its own needs unless additional common carrier service were made available.

This evidence develops another situation. It appears that the commission fixes the rates for the service here involved, but that it is done on a credit basis by the

carrier. Both Whitlock and Rogers testified that they have found it necessary to establish the credit ratings of prospective shippers and that they deny common carrier service to shippers whose credit ratings are not satisfactory to them. There is evidence that Whitlock had advised one shipper that it would not serve him. Whether this was because of a credit or a personal problem is not at all certain.

There is also evidence that Rogers had denied common carrier service to one shipper. It appears that the dispute arose over what was a proper charge. Rogers stated there was a long delay in receiving payment of a large account. Whatever the cause, that shipper has been denied common carrier service by Rogers.

By statute a common carrier is defined as: "* * * any person who or which undertakes to transport passengers or property for the general public in intrastate commerce by motor vehicle for hire, whether over regular or irregular routes, upon the highways of this state; * * *." § 75-223, R. S. Supp., 1955.

We have held: "* * * at common law, so far as its vocation is concerned, a common carrier is one which holds itself out to the public as a carrier always open to employment for the transportation of persons or freight, and that it will carry for all persons indiscriminately." State ex rel. Winnett v. Union Stock Yards Co., 81 Neb. 67, 115 N. W. 627. See, 13 C. J. S., Carriers, § 3, p. 25; 9 Am. Jur., Carriers, § 4, p. 430.

Carriage for all persons indiscriminately is implicit in the statutory definition of a common carrier.

We recognize the rule stated in State ex rel. Board of R. R. Comrs. v. Lischer Bros., 223 Iowa 588, 272 N. W. 604, that: "* * * a common carrier does not cease to be such by refusing to carry for shippers whose ability to pay is doubtful." That issue is not here.

The commission was confronted with a situation where the certified carrier or carriers were electing to set up their own standard as to whom they would serve and

whom they would not serve. It is apparent that indiscriminate service to all persons was not available. This situation bears directly on the question of public convenience and necessity. The protestants rely on our holding in In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507, and Edgar v. Wheeler Transport Service, Inc., 157 Neb. 1, 58 N. W. 2d 496. In those cases we found that the record did not sustain a finding that the present and future public convenience and necessity demanded the service of an additional carrier in the field. Here the record sustains such a finding by the commission.

That finding is within the jurisdiction of the commission's power and duty. It made the finding. The record sustains it. It is not for us to set it aside.

Finally, protestants contend that the order of the commission must be set aside for failure to give consideration to the effect of the grant of the application upon the service of existing carriers. Such consideration is inherent in the order of the commission. Obviously the grant of the certificate to the applicant and its entry into competitive service might well be determined by the commission to be the cause of protestants improving a service which the commission could find from the evidence was not entirely satisfactory.

The declared policy of section 75-222, R. R. S. 1943, is, in part, to regulate transportation "in the public interest," and to promote "efficient service" without "undue preferences or advantages, and unfair or destructive competitive practices." The declared policy does not condemn competition. It does condemn "unfair or destructive competitive practices."

As we read this record the decision of the commission is reasonably reconcilable with the declared legislative policy of this state.

Protestants' contention resolves itself down to the position that they are entitled to have and maintain a monopoly to render the service here involved. On the

showing here, it is that Rogers is entitled to that monopoly. Heretofore we observed that Whitlock had brought itself fairly within the scope of our decision in Dalton v. Kinney, *supra*. Rogers, also, due to its policy of selectivity of shippers and no declared willingness either to improve its service or fully and promptly meet the service required in this industry, placed itself where the commission could have found that it also was within the scope of Dalton v. Kinney so as to justify the issuance of a certificate to applicant. We concluded the opinion in Dalton v. Kinney with this holding: "We also held in In re Application of Richling, 154 Neb. 108, 47 N. W. 2d 413: 'Furthermore, the statute requires that the finding that applicant is fit, willing, and able to perform the proposed service, and that such service is or will be required by the present or future public convenience and necessity, must be sustained by evidence showing that the granting of the certificate was not arbitrary or unreasonable.' The evidence here meets that test."

The holding is applicable here.

Protestants rely on our decision in In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296. Material distinctions exist in that case from the instant one. There the commission was considering an application for a certificate to permit a carrier to enter into a competitive common carrier status in the carrying of passengers over fixed routes on regular schedules. There inheres in such service certain monopolistic characteristics that are generally recognized in the regulation of such public utilities. That element does not exist to that extent in the regulation of common carriers such as are here involved.

There as here we followed the rule that the determination of the issues presented rests with the railway commission and that "its findings and orders will not be interfered with on appeal if any reasonable basis exists

upon which they can be supported." In re Application of Effenberger, *supra*.

There as here we were reviewing a determination of the commission to grant an application. The last two paragraphs of our opinion in the Effenberger case are quite applicable here and with this quote we conclude this opinion: "This court has no power to regulate public utilities. Its function on appeal is limited to an examination of the jurisdiction of the railway commission over the subject matter and a determination of whether or not the order made by the railway commission is reasonable as distinguished from arbitrary action. The policy or wisdom of its action cannot be reviewed by the courts where the foregoing requirements to lawful action are found to exist.

"We are of the opinion that the action of the railway commission in the present case has evidentiary support in the record and constitutes a proper exercise of the powers vested in the railway commission by the Constitution and laws of this state. Under such circumstances this court is without authority to interfere with the result."

AFFIRMED.

J. EDWARD REED AND CLAIRE B. REED, DOING BUSINESS AS REED CONSTRUCTION COMPANY, ET AL., APPELLEES, V. LOWELL J. WILLIAMSON ET AL., APPELLANTS.
82 N. W. 2d 18

Filed March 22, 1957. No. 34065.

1. **Municipal Corporations: Covenants.** A restrictive covenant that lots in an addition to a city shall be exclusively a residential area is unambiguous and prohibits use of the lots for any purpose other than residential.
2. **Mines and Minerals.** A valid restriction that lots in an addition to a city shall be exclusively a residential area prevents use of them for the exploration for or production of oil and gas.

3. **Contracts.** A consideration for a promise may be a detriment to the promisee as well as a benefit accruing to the promisor.
4. **Covenants.** The mutual agreement and obligation of the signers of an instrument to conform to a restrictive covenant expressed therein are a sufficient consideration to support the contract.
5. **Covenants: Easements.** Restrictive covenants, particularly if negative, create equitable easements or servitudes which may be enforced in equity by anyone interested in the property without regard to privity either of contract or of estate and without regard to whether or not the covenants run with the land.
6. ———: ———. Such a restriction is not required to be a grant or reservation. It creates an equitable right in the nature of an equitable easement or servitude if imposed on the use of the land by a common grantor in furtherance of a general improvement plan intended for the mutual benefit of all who may become interested, enforceable in equity on no broader principle than that equity will enforce a proper contract concerning real estate against all taking with notice of it.
7. **Municipal Corporations: Covenants.** The test of whether a change of condition of the surrounding neighborhood is a defense to an action to enforce a restrictive covenant is whether the original purpose and intention of the parties creating the restriction, pursuant to the general scheme, has been so destroyed by the changed condition that the restriction is no longer a substantial benefit to the residents.
8. ———: ———. If the restriction in a residential area has been substantially complied with, the fact that adjoining or surrounding property is used for business purposes does not generally change the character of the area itself so that the owners of property therein may not be entitled to have the restriction enforced.
9. **Injunctions: Covenants.** Injunction is a proper remedy to prevent violation of a restrictive covenant. A remedy at law may be inadequate, may result in a multiplicity of actions, and may permit the subversion of the plan of improvement and development to continue.

APPEAL from the district court for Kimball County: JOHN H. KUNS, JUDGE. *Affirmed as Modified.*

Torgeson, Halcomb & O'Brien, John Knapp, P. M. Everson, for appellants.

Van Steenberg & Myers, George P. Burke, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

This is an injunction action to prohibit appellants from trespassing on the part of Sunny View Heights Addition to Kimball, Nebraska, which is subject to and affected by restrictive covenants, from drilling oil and gas wells thereon, and for general equitable relief.

The following are the circumstances of this litigation:

Gus Rieseberg, referred to as appellant, was the owner of the northeast quarter of the northeast quarter of Section 32, Township 15 North, Range 55 West of the 6th P. M., in Kimball County, which he platted as Sunny View Heights Addition to Kimball on August 12, 1949. He sold and conveyed to J. Edward Reed and Claire B. Reed, husband and wife, as joint tenants, on March 3, 1953, Lots 3 to 8, inclusive, Block 1 of the addition subject to the reservation expressed in the deed "Save and except, however, the oil, gas and other minerals in, on and under said real estate which are reserved to the grantor, his heirs and assigns forever * * *." Appellant, by contract in writing, on March 27, 1953, sold to and J. Edward Reed purchased Block 1 except Lots 1 to 8, inclusive, and Block 2 of said addition subject to the reservation of oil, gas, and other minerals quoted above. The original plat of the addition was vacated on May 29, 1953, the area of the addition was replatted as Sunny View Heights Addition to Kimball, it has since been in existence, and the last plat is the one referred to in this cause.

Appellant, J. Edward Reed, and Claire B. Reed on August 27, 1953, executed and acknowledged an instrument which was by its title characterized as "RESTRICTIVE COVENANTS." It was filed September 1, 1953, and recorded in the public records of Kimball County in the office of the county clerk. It recited that the persons who executed it were the owners of the addi-

tion except the west 165 feet of Block 4 and that they desired to assure persons who acquired lots in the addition that the real estate therein would be used only for certain purposes and in a certain manner. It was made applicable to all the addition except the west 164 feet of Block 4 owned by E. E. Brown on which a house had been constructed and all of Block 5 owned by appellant on which a residence had been built. The instrument consists in part of the following:

"NOW THEREFORE the undersigned Gus Rieseberg, single; J. Edward Reed and Claire B. Reed, husband and wife, do hereby covenant and agree with each and every person who shall hereafter acquire any portion of the above described real estate that: * * *

"2. All of the lots in said Addition shall be exclusively a residential area with the exception of Blocks 1 and 2 and lots 1, 2, 3 and 4 of Block 3 in which commercial development will be permitted, restricted however, to businesses which are either of a retail or professional nature.

"3. That the only buildings which may be erected in said Addition except on those lots where commercial development is permitted shall be either a detached single family dwelling with at least one or more stories above the ground level or a one or two car garage or the equivalent of the latter for exclusive use of storage of furniture, lawn tools, etc, used in ordinary living or maintenance of property. * * *

"5. That no dwelling shall be erected with less than 768 square feet of floor space at or above the ground level.

"6. No trade or activity shall be carried on which will constitute an annoyance or nuisance or which may be offensive or objectionable to the neighborhood. * * *

"It is expressly understood and agreed that these covenants are to run with the land and shall be binding upon each and every person hereafter acquiring an interest in and to any portion of the above described real

estate and they shall be in full force and effect for a period of forty years from and after the first day of June, 1953."

The instrument was joined in by appellant at the solicitation of J. Edward Reed. There was no money or other thing of value given the former by the latter at the time it was executed except as evidenced by the terms of the instrument. Appellant then owned no part of the surface estate of the real estate affected by the instrument except he had the legal title to the part thereof described in the contract of sale and purchase made on March 27, 1953, by him and J. Edward Reed and appellant was entitled to retain the legal title thereto until the unpaid part of the purchase price thereof was satisfied. There was a continuous contract relationship between appellant and J. Edward Reed at all times important to this case.

The contract of March 27, 1953, was canceled by the parties thereto and a new one was made May 27, 1954, containing the reservation to appellant of all oil, gas, and other minerals in, on, or under the real estate. Deeds of the surface estate were made and delivered as required by the contracts. The last deed bears date of February 24, 1955, after this litigation was commenced. Each of the deeds contained reservation in appellant of the oil, gas, and other minerals by the use of the language above set out.

On September 16, 1954, appellant executed and delivered to Lowell J. Williamson, hereafter mentioned herein as lessee, an oil and gas lease of all the real estate first described herein except the west 165 feet of Block 4 of the addition which was owned by E. E. Brown who is not a party to this case. The lessee, or persons acting for him, about January 3, 1955, went upon Lot 10, Block 14 of the addition, without permission, for the purpose of staking a location on which to drill a test well by virtue of the lease given thereon by ap-

pellant. He or they were ordered from the premises and this litigation was instituted.

Gus Rieseberg and Lowell J. Williamson, collectively designated appellants herein, offered at the trial to be bound by and to comply with ordinance No. 140 of Kimball as though it were a contract between them and persons interested in property in the addition. The ordinance was not passed until January 17, 1955, after this litigation was commenced.

J. Edward Reed, hereafter designated Reed, financed the housing project he developed on the premises he bought from appellant through the Prudential Insurance Company of America, hereafter called insurance company, by loans made by it and guaranteed by the Federal Housing Administration, designated herein FHA. The negotiations for financing the project had their inception about May 15, 1953, when FHA was advised of the proposed plans of the project. FHA would not have insured loans on property in the addition in the absence of restrictive covenants as suggested in an outline issued by it for development of single-family, detached dwellings. The first sentence of Requirement 1 of the FHA outline for that class was: "No lot shall be used except for residential purposes." The first loan application submitted by Reed was June 23, 1953, prior to the execution of the restrictive covenants by him and appellant, and the commitment of the insurance company was made July 14, 1953, but it was conditioned upon restrictive or protective covenants being secured before the loan was closed. A temporary injunction was granted January 4, 1955, by the district court which prohibited appellants from going upon the premises and exploring for oil and gas. There had been loaned prior thereto on property in the addition $93,000. Loaning on property therein had been discontinued until the injunction was procured, but subsequent thereto the insurance company loaned on property in the addition $162,600.

Appellant offered proof that the reasonable value of

the mineral estate in the 40 acres comprising the addition was $400,000. Appellee produced evidence that the leasehold interest was worth $225 to $250 per acre for the 40-acre tract. Reed had expended on the addition between $50,000 and $60,000. The value of the houses constructed on the addition by Reed was $430,000.

The interveners, except the insurance company, are purchasers from Reed of residences within Sunny View Heights Addition and the relief they seek is identical with the relief asked by Reed. The district court did not obtain jurisdiction of the person of any of the defendants named in the petition except appellant and the lessee who are the appellants in this court.

The district court found generally for appellees and against appellants; that the use of the property involved for drilling oil wells is prohibited by the restrictive covenants entered into by Reed, his wife, and appellant; that by the execution of the restrictions contained in the covenants appellant abandoned his easement for entry upon the premises to explore for oil and gas; and that the bar thereof against appellant extends to his successors in interest. The judgment rendered permanently enjoined appellants and their successors from trespassing on the premises and from drilling oil and gas wells thereon. That judgment is the subject of this appeal.

In the instance of the sale and conveyance of a surface estate the law implies a means for providing the benefit of the mineral estate. It is the rule that if the surface estate and the mineral estate are separated, the law implies a means of access to permit the owner of the mineral estate to have the benefit of it. A conveyance of the surface of the land or the reservation of the oil and gas in place contains an implied reservation of a right of access to the severed estate below. This is expressed in MacDonnell v. Capital Co., 130 F. 2d 311: "There is, apparently, complete unanimity amongst the various jurisdictions as regards the rule that an expressed

mineral reservation contained in a deed carries with it, by necessary implication, the right to remove such minerals (including gas and oil) by the usual or customary methods of mining and thus reduce them to possession even though the surface ground may be wholly destroyed as a result thereof." See, also, Annotation, 146 A. L. R. 901. It was the right described in the above of access to and use of the surface estate that the trial court found appellant abandoned when he executed and delivered the instrument containing the restrictive covenants.

The problem indispensable to the decision of this case is the meaning and effect of the language of the instrument entitled "RESTRICTIVE COVENANTS" executed by appellant that "All of the lots in said Addition shall be exclusively a residential area * * *."

In Carr v. Trivett, 24 Tenn. App. 308, 143 S. W. 2d 900, the court said: "A restrictive covenant providing that conveyed property should not be used except for 'residential purposes' and that no building should be erected thereon to be used for purposes of any trade, manufacture, or other business was unambiguous and could not be construed otherwise than as a prohibition against use of property for any purpose other than residential." In the opinion it is stated: "While restrictive covenants are to be strictly construed and will not be extended by implication to include limitations upon the free use of the property not plainly prohibited by the terms of the deed * * * such restrictions are to be given a fair and reasonable meaning so as to ascertain the intention of the parties * * *. The restrictive clause here under consideration is clear and unambiguous and cannot be reasonably construed otherwise than as a prohibition against the use of the property for any purposes other than for residential purposes."

The court in Briggs v. Hendricks (Tex. Civ. App.), 197 S. W. 2d 511, considered a restriction that all lots in the tract should be known and described as residential lots

except the portion designated as a business center, and that no structure should be erected on any residential building plot other than for detached family dwelling and other outbuildings incidental to the residential use of the plot. In reference thereto the court said: "Courts judicially know that the purpose of restricting lots in additions to cities to residential use is to establish an area free from commercial activity, and thereby enhance the value of such lots as residential property. The word 'residential' as used in a covenant restricting the use of property, is used in contradistinction to 'business' or 'commerce.'"

Hunt v. Held, 90 Ohio St. 280, 107 N. E. 765, L. R. A. 1915D 543, Ann. Cas. 1916C 1051, considered a restriction that the property was sold for residence purposes only and therein this observation is made: "But is there any doubt as to the meaning of the words? The word 'residence,' as we view it, is equivalent to 'residential' and was used in contradistinction to 'business.' * * * The word 'residence' has reference to the use or mode of occupancy to which the building may be put."

The opinion in West Nichols Hills Presbyterian Church v. Folks, — Okl. —, 276 P. 2d 255, uses this language: "We think the terms of the restrictions before us are clear and unambiguous. The use of the land for 'residence purposes only' means that the lots shall be used for residences and for no other purpose, and the recital of certain specific uses which are prohibited for the entire eight blocks, but failing to specifically forbid parking for those attending a nearby church, does not nullify or in any way effect (affect) the clearly expressed intention of the dedicator that the lots involved here shall be used for residence purposes only."

In Jernigan v. Capps, 187 Va. 73, 45 S. E. 2d 886, 175 A. L. R. 1182, the court said: "It is not necessary that we go to a dictionary or a law book to ascertain the meaning of 'a residential building.' Giving the words their plain and ordinary meaning, we would say that

such a building is one which is used for residential purposes,—that is, one in which people reside or dwell, or in which they make their homes, as distinguished from one which is used for commercial or business purposes. But if the obvious must be supported by authority or judicial precedent, we find that they are of the same view. Webster's New International Dictionary, 2d Ed., defines 'residential' as: 'Used, serving, or designed as a residence or for occupation by residents; * * *. Adapted to, or occupied by, residences; as, a residential quarter.'"

Moore v. Stevens, 90 Fla. 879, 106 So. 901, 43 A. L. R. 1127, decided: "The covenant under which appellee claims the right to injunctive relief is the one which provides that appellant's property 'is to be used for residence purposes only.' There is no ambiguity in the quoted expression, nor doubt as to its meaning, when considered in the light of the entire transaction in which it was used and its component words are accorded their ordinary, well understood meaning. The word 'residence' is one of multiple meanings, but the context in which it is used in this instance clearly indicates its meaning to be a dwelling house where a person lives in settled abode. The word, in this instance, relates solely to the use or mode of occupancy to which the property may be put. * * * When so employed and understood, it necessarily excludes all uses of the property other than for residence purposes, and the interposition of other negative terms specifically prohibiting the use of the property for business, mercantile or other similar purposes are unnecessary."

Southwest Petroleum Co. v. Logan, 180 Okl. 477, 71 P. 2d 759, concerned a part of Lincoln Terrace Addition to Oklahoma City. There were three plats of different parts of the addition. Attached to each was a certificate of the owner. The first and second each specified: "All lots in this plat are restricted to residences only * * *." The certificate attached to the last plat recited: "All

lots in this plat are restricted to dwellings only." The court said: "A valid restriction that 'All lots in this plat are restricted to residences only' prevents the use of such property for the drilling of oil and gas wells." This language appears in the opinion: "The question then narrows to one of interpretation of the clause, 'All lots in this plat are restricted to residences only,' or 'to dwellings only.' Both terms will be considered as synonymous. We are not unmindful of the rule that restrictions on the use of real property must be construed strictly. * * * Nevertheless they will be enforced in a proper case and will not be extended on the one hand or limited on the other, but strictly enforced. * * * The phrase 'All lots in this plat are restricted to residences only' excludes all other uses upon the land, and is clear and unambiguous. Under the natural and common sense meaning of the term 'residences' we cannot say that the drilling of wells for oil and gas is a use of property for residence purposes. It does not matter that the parties did not anticipate the oil development in this area and contemplate the necessity of excluding the drilling of oil wells in the addition when it is clear that they intended to exclude every use not pertaining to residence purposes." Smith Oil Co. v. Logan, 180 Okl. 474, 71 P. 2d 766, is a companion case of the one last quoted. State ex rel. Marland v. Phillips Petroleum Co., 189 Okl. 629, 118 P. 2d 621, approves the conclusion of the Southwest Petroleum case by saying that the court adheres to the rule there announced that a lot owner in Lincoln Terrace could not subject the land to the ordinary right of an oil and gas lease to the extent of drilling an oil and gas well thereon. See, also, Christ's Methodist Church v. Macklanburg, 198 Okl. 297, 177 P. 2d 1008; Arlt v. King, 328 Mich. 645, 44 N. W. 2d 195; Redfern Lawns Civic Assn. v. Currie Pontiac Co., 328 Mich. 463, 44 N. W. 2d 8; West Bloomfield Co. v. Haddock, 326 Mich. 601, 40 N. W. 2d 738; Mattson v. Fezler, 202 Okl. 589, 216 P. 2d 275; Hogue v. Dreeszen, 161 Neb. 268, 73 N. W. 2d 159; Dundee Realty Co. v. Nichols, 113

Neb. 389, 203 N. W. 558; 26 C. J. S., Deeds, § 164 (3), p. 1114; Annotation, 175 A. L. R. 1191.

Cooke v. Kinkead, 179 Okl. 147, 64 P. 2d 682, is characterized by appellants as a case directly in point with the one now under consideration. The language of the opinion in the Kinkead case demonstrates that the appraisal of it as decisive of the case presently being considered is unjustified. This language of the Kinkead case sets it apart from this case: "The language is clear and specific to the effect that no building shall ever be used or occupied for any purpose except that of residence exclusively. There can be no doubt as to the meaning of such language. In order to sustain plaintiff's contention in this case we would be compelled to distort the well-established meaning of words of common usage, and to extend such meaning by implication to situations unexpressed in the instrument. If there was an intention on the part of the dedicators to restrict the use of the land itself, such intention is unexpressed, and is unavailing in this case. Moore v. Stevens, supra. In so far as the land itself is concerned, there are no express words limiting its use, and to that extent the defendants who are landowners in the addition hold the same in fee-simple title, subject only to the restrictions on the use of buildings erected thereon." The court that decided the Kinkead case distinguished it in Southwest Petroleum Co. v. Logan, *supra*, by this language: "The case of Cooke v. Kinkead, supra, denying an injunction to prevent drilling in Howe's Capitol addition to Oklahoma City, is distinguishable from the instant case in that the restrictions there were held to apply to the use of buildings on the premises and not to the use of the land itself. In the case before us, the restrictions clearly apply to the use of the land." In this case the language of the restriction that "All of the lots in said Addition shall be exclusively a residential area" applies to the use of the land. In this situation the Kinkead case cannot influence the decision of this case.

The premises involved were, at the time of the execution of the instrument evidencing the restrictive covenants, owned in this manner: Appellant owned the mineral estate and the legal title to the part of the surface estate sold by him to Reed on contract which had not been fully performed. Reed owned the surface estate except the legal title to a part of it which was held by appellant as above stated. The appellants argue that the restrictive covenants do not affect the mineral estate of appellant because of a lack of consideration. He owned Block 5 of the addition when he executed the instrument containing the restrictions. It was not burdened by them but it was obviously benefited thereby. Appellant was assured by them that the addition would be an exclusive restricted residential area consisting of newly built houses according to a plan for its permanent improvement; that no undesirable improvement could be made therein; and that no objectionable activity could be conducted thereon. Block 5 would enjoy this advantage and benefit without the burden imposed on the property within the terms of the restrictions.

The unpaid part of the indebtedness of Reed on his contract of purchase of March 27, 1953, probably in excess of $12,000, was secured to appellant only by the legal title to the real estate described in the contract. The real estate was then unimproved. Reed could not accomplish his house-building project on it without financing and he could get it only if the use of the real estate was restricted to residential purposes. This was accomplished by appellant becoming a party to the restrictions and thereby the value of the security he had for the indebtedness owing him was very materially increased because of the improvements made.

The restrictions were in these respects a two-fold advantage and benefit to appellant. They were also a detriment to him if they operate, as the trial court found, to limit the means of access to the restricted premises he had to recover and enjoy any oil and gas in and

under the land. If what was done conferred a benefit on appellant or was a detriment to him, it was a consideration for the transaction. A consideration sufficient to support a promise may be a detriment to the promisee as well as a benefit accruing to the promisor. United States Fidelity & Guaranty Co. v. Curry, 126 Neb. 705, 254 N. W. 430; Crawford State Bank v. McEwen, 132 Neb. 399, 272 N. W. 226; Fluckey v. Anderson, 132 Neb. 664, 273 N. W. 41; Phelps v. Blome, 150 Neb. 547, 35 N. W. 2d 93.

The instrument expressing the restrictions contains reciprocal and mutual covenants. Appellant thereby bound himself not to violate the covenants and if he did, anyone interested in the real estate was authorized to enforce them or sue for damages at his election. Reed made the same promise and for any violation exposed himself to proceedings to enforce the covenants or to be subjected to a suit for damages. A like promise proceeded from appellant and Reed to subsequent purchasers and from them to appellant and Reed. These are mutual and reciprocal promises and rights.

The court said in Erichsen v. Tapert, 172 Mich. 457, 138 N. W. 330: "The mutual agreements of the signers to conform to the restrictions was sufficient consideration to support the contract." See, also, 12 Am. Jur., Contracts, § 113, p. 606; Restatement, Contracts, §§ 75-76, pp. 80-86. The execution and delivery of the restrictive covenants were not without legal and sufficient consideration.

The prohibitory efficacy of the restrictions as to appellants is contested by their assertion that the instrument containing them does not literally eliminate the drilling of test wells for oil and gas and was not intended to do so. The words oil and gas are not written in the instrument containing the restrictions. It is significant that paragraph 2 of the instrument which contains the words "All of the lots in said Addition shall be exclusively a residential area" is not mentioned by appellants.

They refer to and set out in full paragraph 3 which describes the buildings that may be erected and paragraph 6 which forbids any activity which may cause an annoyance or nuisance or which may be offensive or objectionable as the parts of the instrument pertinent to the discussion of this contention. They disregard the highly important and all-inclusive declaration that the lots shall be exclusively a residential area. It may not be concluded that the drilling of a well or wells for oil and gas is a use of the lots for residential purposes or that a limitation on the use of the real estate like that contained in the restriction in this case does not exclude every use of the premises not pertaining to residence purposes.

In Southwest Petroleum Co. v. Logan, *supra*, the court said: "Under the natural and common sense meaning of the term 'residences' we cannot say that the drilling of wells for oil and gas is a use of property for residence purposes. It does not matter that the parties did not anticipate the oil development in this area and contemplate the necessity of excluding the drilling of oil wells in the addition when it is clear that they intended to exclude every use not pertaining to residence purposes."

West Nichols Hills Presbyterian Church v. Folks, *supra*, employs this language: "The use of the land for 'residence purposes only' means that the lots shall be used for residences and for no other purpose, * * * but failing to specifically forbid parking for those attending a nearby church, does not nullify or in any way effect (affect) the clearly expressed intention of the dedicator that the lots involved here shall be used for residence purposes only."

Carr v. Trivett, *supra*, concluded: "The restrictive clause here under consideration (for 'residential purposes') is clear and unambiguous and cannot be reasonably construed otherwise than as a prohibition against the use of the property for any purposes other than for residential purposes."

In Moore v. Stevens, *supra*, the restriction upon which injunctive relief was based provided that the property could be used for residence purposes only. The court said in reference thereto: "The covenants here under consideration relate to the *use* to be made of the property rather than to the character of the building to be erected upon it." See, also, Annotation, 155 A. L. R. 528.

The argument is made that the restrictions concerned herein must fail because of lack of privity of estate. The factual basis for this, as stated by appellants, is that Reed had no interest in the mineral estate and at the time the restrictions became effective appellant had only the legal title as security for an indebtedness to a part of the surface estate which is considered personal property. Buford v. Dahlke, 158 Neb. 39, 62 N. W. 2d 252. Appellants concede, with some undefined reservation, that there is "perhaps privity of estate between Reed and Rieseberg" as to the surface estate but they assert this does not authorize interfering with the mineral estate. The present case permits escape from what has been characterized the utter confusion of judicial decisions involving the problem of whether a covenant is real so as to run with the land or merely collateral or personal.

The discussion in Southwest Petroleum Co. v. Logan, *supra*, is pertinent to the hypothesis of appellants: "It has long been an established principle that an agreement restricting the use of land in a certain tract, imposed thereon by a common grantor under a general improvement plan, intended for the mutual benefit of all grantees therein, may be enforced in equity by any subsequent grantee in such tract, who purchased with reliance on the general plan, against any other subsequent grantee taking with notice of the restrictions. * * * The restrictions need not rise to the dignity of a grant or reservation, but create an equitable right in the nature of an easement, enforceable in equity against all persons taking with notice, even if it rests on no broader

principle than that equity will enforce a proper contract concerning land, against all persons taking with notice of it."

In Johnson v. Robertson, 156 Iowa 64, 135 N. W. 585, Ann. Cas. 1915B 137, it is declared: "From these decisions it will be observed that these building restrictions or agreements, particularly where negative in character, create equitable easements, amenities, or servitudes, and that they may be enforced by any one interested in the property without regard to privity either of contract or estate and no matter whether the covenant may be said to run with the land or not."

Friesen v. City of Glendale, 209 Cal. 524, 288 P. 1080, contains this language: "A restriction imposed by subdividers of a tract of land contained in all deeds conveying lots therein that the premises shall be used for residence purposes only, which restriction was to inure to the benefit of each of the lots in the tract and was accepted by the grantees of said lots, is in the nature of a negative easement or equitable servitude and not a positive easement of right in the land itself * * *. It is merely a right enforceable in equity as between the parties to the contract, or their successors with notice, on the theory that it would be unconscionable to permit one who had contracted to use his property in a particular way to violate his agreement."

The Wisconsin court said in Boyden v. Roberts, 131 Wis. 659, 111 N. W. 701: "The whole tract of land being by the Johnston-Weiss agreement impressed with an equitable servitude for the benefit of all purchasers under the scheme that the property should be preserved for first-class residence property, and other uses named prohibited, each grantee is entitled to enforce such restriction in equity. 2 Pom. Eq. Jur. (3d ed.) § 689; 1 Jones, Real Prop. in Conv. § 780. Where the general plan or scheme of an agreement restricts property to a certain use and prohibits other uses, it is immaterial whether the covenant runs with the land or not, where

the agreement is made for the mutual benefit of all the land though held by different owners. In such case equity will enforce such servitude as between the several grantees of parts of the premises with notice." See, also, 7 Thompson on Real Property (Perm. Ed.), § 3614, p. 102; II American Law of Property, § 9.26, p. 409; 26 C. J. S., Deeds, § 167 (2), p. 1143; 14 Am. Jur., Covenants, Conditions and Restrictions, § 193, p. 608.

Appellants are barred from trespassing on the part of Sunny View Heights Addition to Kimball, Nebraska, which is subject to and affected by restrictive covenants, and from going upon the premises which are within the reach of the provisions of the instrument containing the restrictions involved herein for the purpose of exploring for and producing oil and gas or for any other purpose inconsistent with the terms of the instrument. Appellant desired that Sunny View Heights Addition be constituted and developed as a restricted area for residential purposes only. He was pleased to have an instrument to accomplish this executed and made effective as to all who had or acquired any part of the addition. He realized this by joining appellees in the execution of the instrument on August 27, 1953. Appellees, because of this instrument, expended between that date and May 27, 1954, about $10,000 for a sewage system and for sidewalks. They also invested more than $50,000 in development of the property, about three-fourths of which was after August 27, 1953. The restrictions made it possible for appellees to finance the housing project and this in turn induced the large investment which they made of their individual resources. The insurance company, after the execution and recording of the instrument reciting the restrictions, loaned more than $200,000 on residence properties in the addition. The individual interveners purchased houses therein because of the restricted nature of the area. Any rights acquired by Lowell J. Williamson in the addition are subject to the restrictions. He claims through appellant.

May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448, repeats the language of 10 R. C. L., § 19, p. 689, as follows: "Equitable estoppels operate as effectually as technical estoppels. They cannot in the nature of things be subjected to fixed and settled rules of universal application, like legal estoppels, nor hampered by the narrow confines of a technical formula. * * * The following, however, may be ventured as the sum of all cases: That a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith, relied thereon. Such an estoppel is founded on morality and justice, and especially concerns conscience and equity." See, also, 31 C. J. S., Estoppel, § 59, p. 236.

Ricketts v. Scothorn, 57 Neb. 51, 77 N. W. 365, 73 Am. S. R. 491, 42 L. R. A. 794, adopts this language from 2 Pomeroy, Equity Jurisprudence, p. 804: "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy." See, also, Cotner College v. Estate of Hester, 155 Neb. 279, 51 N. W. 2d 612. Appellants may not escape the effect of the instrument to which one of them was a party and which has produced the result of which they now complain. Polyzois v. Resnick, 123 Neb. 663, 243 N. W. 864.

The many changes in the Kimball area and community resulting from the production of oil and gas and the incidences thereof are detailed in an effort to show that the purposes of restrictions imposed on the addition have been to such an extent defeated that the prohibitions sought as to appellants are meaningless and

futile. A reference to language in Southwest Petroleum Co. v. Logan, *supra,* is an appropriate refutation of this: "The law regarding change of condition of the surrounding neighborhood as a defense to such actions appears fairly well settled, but each case must be decided on the equities of each particular situation as it is presented. The test ordinarily is whether the original purpose and intention of the parties creating the restrictions pursuant to the general scheme has been so destroyed by the changed conditions, without fault on the part of those who seek to be relieved, that the restrictions are no longer of substantial benefit to the residents, and the original purpose cannot be reasonably effected by the granting of an injunction. * * * From our examination of the entire record we conclude that the addition still has substantial value to the lot owners for residential purposes. Under these circumstances, although the property is undoubtedly valuable for oil and gas purposes, this will not relieve the defendants from the restrictions, for we cannot say that the original purpose of preserving to the home owners in the addition a purely residential district cannot be accomplished by granting the injunctions. * * * We cannot accede to defendants' argument that the original purpose to create an exclusive high class residence district has been destroyed because it will no longer be high class or exclusive. The question is not whether suitable persons will in the future purchase property in the addition, but whether the restrictions still preserve to the addition its character of a residence district."

The Michigan court said in Bohm v. Silberstein, 220 Mich. 278, 189 N. W. 899: "Where the restrictions in a residential subdivision consisting of 18 blocks have been substantially complied with, the fact that adjoining or surrounding property is used for business purposes does not so change the character of the subdivision itself that the owners of property therein may not have the restrictions enforced."

Appellants contest injunction as an appropriate remedy in this case. They say the harm therefrom to them is very much greater than the benefit to those in whose favor it has been granted because, they affirm, the effect of it is a confiscation of the mineral estate of appellant. These arguments may not be accepted. Appellant's mineral estate has not been confiscated. He may drill for oil on Block 5 of the addition and produce all the oil and gas thereby discovered. There is no claim in this case that the restrictions apply in any way to Block 5. Appellants may adopt, if they desire, directional drilling from that location. Appellant owns and may continue to own the mineral estate as far as any effect this case has on it. Injunction is in this class of cases an appropriate if not the only adequate remedy. This has been declared by this court in Dundee Realty Co. v. Nichols, *supra*: "A remedy at law would be inadequate, and would lead to a multiplicity of actions, and the subversion of this ideal scheme of improvement and development would still remain. This dwelling, as located, is a clear and direct violation of the letter as well as the spirit of the restrictive covenant, and is an irreparable injury to each of plaintiffs, and to each lot owner in the addition, thus creating a condition which is appealing to a court of equity, in the exercise of its extraordinary power. The relief sought by plaintiffs is fair, equitable, and just." See, also, Hogue v. Dreeszen, *supra*.

The restrictive covenants involved herein by their terms terminate June 1, 1993. The judgment granted an injunction of unlimited duration, enjoining appellants and their successors from trespassing on the premises involved and from drilling oil and gas wells thereon. The judgment is incorrect in the respect that the injunction was not limited to the period of the existence of the restrictions. The judgment should be and it is modified to provide that the injunction granted be and is limited to the period ending June 1, 1993.

The judgment should be and it is affirmed as modified.

AFFIRMED AS MODIFIED.

CHAPPELL, J., participating on briefs.

KATHLINE BEACOM, ADMINISTRATRIX OF THE ESTATE OF HELEN D. DALEY, DECEASED, APPELLEE, V. JOSEPH J. DALEY, APPELLANT.

81 N. W. 2d 907

Filed March 22, 1957. No. 34076.

1. **Landlord and Tenant.** The occupancy of premises by one person with the consent or permission of the owner, or with the consent of the person entitled to assert a right to the possession of the premises, creates between the parties the relation of landlord and tenant and, in the absence of an agreement or circumstances indicating a contrary intent, the law will imply an agreement on the part of the tenant to pay the reasonable value for his use and occupation.
2. ———. Where rent is payable yearly, and there is no provision for payment in advance, it is not due until the end of the year.
3. **Limitations of Actions.** An action for the recovery of the reasonable value for the use and occupancy of lands is not barred by the statute of limitations until 4 years have elapsed from the accruing of such action.
4. ———. Any voluntary payment made by the debtor upon such cause of action would arrest the running of the statute of limitations with reference thereto.
5. ———. A voluntary payment upon a claim otherwise barred by the statute of limitations is one that was intentionally and consciously made and accepted as part payment of the particular indebtedness in question under such circumstances as would warrant a clear inference that the debtor assented to and acknowledged the greater debt to be due as an existing liability.
6. **Attorney and Client.** A communication made to an attorney at law, where the relationship of attorney and client does not exist, is not privileged, although the attorney was employed as such in some other capacity.
7. ———. When two or more persons employ or consult the same attorney in the same matter, communications made by them in relation thereto are not privileged inter sese.
8. ———. Communications between attorney and client made in

the presence of others do not constitute privileged communications within the meaning of sections 25-1201 and 25-1206, R. R. S. 1943.

9. Life Estates. On the termination of a life estate the reversioner becomes immediately entitled to the possession of the real estate and, in the absence of any specifically controlling provision in the instrument creating the life estate or statute relating thereto, the right to all rentals thereafter becoming due.

10. ———. As between the life tenant and the owner of the fee, it is the duty of the former to pay all taxes charged against the land during the continuance of his estate.

11. ———. A life tenant must make all the ordinary repairs necessary to preserve the property and prevent its going to waste, but he need not make extraordinary repairs.

APPEAL from the district court for Dakota County: ALFRED D. RAUN, JUDGE. *Reversed and remanded with directions.*

Warner & Warner, C. D. Shokes, and *S. W. McKinley, Jr.,* for appellant.

Mark J. Ryan, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for Dakota County of an action wherein Kathline Beacom, as administratrix of the estate of Helen E. Daley, also appearing in the evidence as Hellen E. Daley, deceased, seeks to recover from Joseph J. Daley the fair and reasonable rental value of certain lands in Dakota County for the years from 1941 to 1952, both inclusive. The trial court awarded plaintiff a judgment for the sum of $9,741.88. Defendant thereupon filed a motion for new trial and, from the overruling thereof, took this appeal.

The lands involved consist of 155 acres in Dakota County described as follows: "The South 13 2/3 chains of the South Half of the Northeast Quarter (S½ NE¼) and the South 13 2/3 chains of the Southeast Quarter of the Northwest Quarter (SE¼ NW¼) and the North-

west Quarter of the Southeast Quarter (NW¼ SE¼) and the Northeast Quarter of the Southwest Quarter (NE¼ SW¼) all in Section 1, Township 28, Range 7, East, in said County and State."

Basically these facts are not in dispute: That on and immediately prior to February 21, 1941, Helen E. Daley, a widow, was the owner of the foregoing lands; that on February 21, 1941, she conveyed these lands to her son, appellant Joseph J. Daley, by warranty deed; that appellant has been in continuous possession of and farmed these lands at all times herein material, up to and until the time of his mother's death on June 22, 1952; that this occupancy was without any lease agreement, either written or oral; and that Helen E. Daley died intestate, leaving appellant and 4 daughters as her sole heirs at law. The daughters are Kathline Beacom, Ann Ebel, Evelyn Rush, and Margaret O'Neill. Appellee is the duly appointed, qualified, and acting administrator of her estate. The father, John T. Daley, died on July 11, 1938. However, prior to his death, he had conveyed the foregoing premises to his wife, Helen E. Daley. Appellee commenced this action on July 30, 1953. We shall herein refer to the decedent, Helen E. Daley, as the mother.

The deed to appellant contained this reservation: "Grantor, however, reserves the right to the use and enjoyment and income from said premises as long as she lives." The mother thereby retained a life estate in the premises and appellant, who was thereafter in possession, was, under the situation herein disclosed, liable to his mother for the fair and reasonable value of the use and occupancy of the premises, payable at the end of each year. Guthmann v. Vallery, 51 Neb. 824, 71 N. W. 734, 66 Am. S. R. 475; Mast v. Murray, 122 Neb. 284, 240 N. W. 302. As stated in Mast v. Murray, *supra:* "It is the rule: 'Where the rent is payable periodically as yearly, quarterly or the like, and there is no provision for payment in advance, it is not due and payable until

the end of the year.' 16 R. C. L. 928, sec. 436." And as stated in the annotation to 126 A. L. R. 565: "Where by the contract the rent is payable either yearly, half yearly, quarterly, monthly, or weekly, and there is no provision for payment at any particular time during such periods, either expressly made or to be gathered by necessary implication from the acts and circumstances of the parties or by custom or usage in the community, the rent is not due and payable until the end of those respective periods."

However, appellant contends there can be no implied contract where there is an express agreement between the parties relative to the same subject matter, citing Acton v. Schoenauer, 121 Neb. 62, 236 N. W. 140, in support thereof. The foregoing is undoubtedly a correct statement of the law but has no application here. While the evidence adduced establishes there was some form of verbal arrangement between the appellant and his mother as to the former's use of these lands, appellant admits this arrangement never reached the status of having definite terms. Under this situation appellant would be required to pay a fair and reasonable annual rental for the premises he occupied during the period of the life estate. See, Stoddard v. Baker, 85 Neb. 729, 124 N. W. 159; Oakes v. Oakes, 16 Ill. 106; 32 Am. Jur., Landlord and Tenant, § 430, p. 349; 52 C. J. S., Landlord and Tenant, § 462, p. 201, § 470, p. 209. As stated in 52 C. J. S., Landlord and Tenant, § 470, p. 209: "* * * ordinarily, in the absence of an agreement to the contrary, the occupancy of premises belonging to another with the consent of the owner implies an agreement by the tenant to pay rent." And as stated in 32 Am. Jur., Landlord and Tenant, § 430, p. 349: "The occupancy of premises by one person with the consent or permission of the owner, or with the consent of the person entitled to assert a right to the possession of the premises, creates between the parties the relation of landlord and tenant, and in the absence of an agreement or circumstances in-

dicating a contrary intent, the law will imply an agreement on the part of the tenant to pay the reasonable value of his use and occupation." And, in this respect, we do not think the relationship of mother and son raises a presumption of gift in view of the fact that the appellant admits there was some arrangement between he and his mother that he was to pay his mother for the use thereof. See, Johnson v. Ghost, 11 Neb. 414, 8 N. W. 391; Fischer v. Wilhelm, 140 Neb. 448, 300 N. W. 350; Oakes v. Oakes, *supra.*

As already stated, appellee brought this action for an accounting of rents. Appellant contends that if appellee has a cause of action against him it is one at law and not in equity. Ordinarily a court of equity has no jurisdiction of an action for rent and claims for unpaid rent are separate and distinct causes of action for each term or payment involved. However, rent may be recovered in equity where the remedy has become difficult or where there is an uncertainty as to the title or the extent of the defendant's responsibility. See, Schuster v. Schuster, 84 Neb. 98, 120 N. W. 948, 29 L. R. A. N. S. 224; Fiala v. Tomek, 164 Neb. 20, 81 N. W. 2d 691; 32 Am. Jur., Landlord and Tenant, § 521, p. 427, § 523, p. 430, § 527, p. 434; 52 C. J. S., Landlord and Tenant, § 552b, p. 365. In Schuster v. Schuster, *supra,* we remanded the cause "with directions to take an accounting of the rents and profits of the land in controversy herein" but limited it to 4 years. In this respect the form of the action does not arrest the statute of limitations. See, Schuster v. Schuster, *supra;* Logan v. Davis, 190 Iowa 278, 180 N. W. 184; 32 Am. Jur., Landlord and Tenant, § 521, p. 427; § 25-206, R. R. S. 1943. As held in Schuster v. Schuster, *supra:* "An action for the recovery of rents and profits from a cotenant is not barred by the statute of limitations until four years have elapsed from the accruing of such action." Of course any voluntary payment made by the debtor upon any cause of action would be sufficient to arrest the run-

ning of the statute of limitations with reference thereto. S. 25-216, R. R. S. 1943; Alexanderson v. Wessmann, 158 Neb. 614, 64 N. W. 2d 306. As stated in Alexanderson v. Wessmann, *supra:* "The voluntary payment of part of a debt arising on contract, a written acknowledgment of it, or a promise in writing to pay it tolls the statute of limitations except as is otherwise provided by section 25-216, R. R. S. 1943." But as stated in In re Estate of Anderson, 148 Neb. 436, 27 N. W. 2d 632: "A voluntary payment upon a claim otherwise barred by the statute of limitations is one that was intentionally and consciously made and accepted as part payment of the particular indebtedness in question under such circumstances as would warrant a clear inference that the debtor assented to and acknowledged the greater debt to be due as an existing liability."

We have come to the conclusion that although an accounting is not the proper form of action in cases to recover rents, however, because of the complexity of the situation as it relates to appellant's liability, it was proper for the trial court to proceed to try this case as one in equity.

Does the evidence adduced establish that the mother and appellant, on July 27, 1949, settled everything owing by appellant for his use of these lands for the years 1941 to 1948, both years included? An affidavit by the mother of that date, subscribed by her before F. B. Hurley, a Notary Public, contains the following language: "Affiant further states that subsequently, on February 21, 1941, she conveyed said premises * * * to her son, Joseph J. Daley, and that ever since said time he has been the owner of said premises; that in said deed she reserved the life use of said premises and that she has always had a satisfactory return from said land ever since said time and that her present arrangement with said Joseph J. Daley as to the income is entirely satisfactory to her." Hurley, a practicing attorney at Ponca, Nebraska, tes-

tified in regard to this affidavit that: "Well, the conversation principally was relative to this instrument which I prepared relating to delivery of the deed mentioned, and at that time she told me that her present arrangement with Joe was entirely satisfactory to her and everything had been settled up to date." We think this evidence, if admissible, together with all the circumstances established by the record, fully supports a finding that appellant and his mother had made a full settlement between themselves covering these years as far as appellant's use of the lands herein involved is concerned. The question then is, was Hurley disqualified to testify in regard thereto because of his relationship to the mother, he being an attorney?

The record shows that at the time this affidavit was drafted, signed by the mother, and subscribed by her before Hurley appellant was present. Whether or not Hurley represented the mother, appellant, or both is not too clear from the evidence, although we are inclined to think he was representing appellant. However, under our holdings, this would be immaterial for Hurley's evidence would be admissible in any event. If the mother was not represented on that occasion by Hurley the following from O'Connor v. Padget, 82 Neb. 95, 116 N. W. 1131, would apply: "A communication made to an attorney at law, where the relationship of attorney and client does not exist, is not privileged, although the attorney was employed in some other capacity." See, also, 70 C. J., Witnesses, § 545, p. 404. If both the mother and appellant were represented on that occasion by Hurley then the following from Jenkins v. Jenkins, 151 Neb. 113, 36 N. W. 2d 637, would apply: " 'When two or more persons employ or consult the same attorney in the same matter, communications made by them in relation thereto are not privileged inter sese. By selecting the same attorney, each party waives his right to place those communications under the shield of professional confidence. Either party

may introduce testimony concerning the same as against the other, or his heirs or representatives. * * *.' 58 Am. Jur., Witnesses, § 496, p. 277." See, also, 70 C. J., Witnesses, § 551, p. 410. If the mother was represented by Hurley and appellant was not then what was held in Short v. Kleppinger, 163 Neb. 729, 81 N. W. 2d 182, would have application. Therein we said: "Communications between attorney and client made in the presence of others do not constitute privileged communications within the meaning of sections 25-1201 and 25-1206, R. R. S. 1943." See, also, 70 C. J., Witnesses, § 545, p. 404.

Since the mother died on June 22, 1952, the question arises, was appellant liable for rent for the year 1952? Death of the mother (life tenant) terminated her interest immediately and thereupon appellant became entitled to the possession of the real estate. Guthmann v. Vallery, *supra*. As stated in Guthmann v. Vallery, *supra:* "On the termination of the life estate the reversioner became at once entitled to the possession of the real estate; * * *."

The rent for 1952 was not due until March 1, 1953. As stated in 33 Am. Jur., Life Estates, Remainders, Etc., § 308, p. 813: "The right to rentals continues only until his death and no longer, if he is a life tenant for the duration of his own life." And in 31 C. J. S., Estates, § 65b, p. 81: "On the termination of a life estate, rights claimed through the life tenant cease and the remainderman is entitled to possession."

As stated in Johnson v. Siedel, 178 Iowa 244, 159 N. W. 677: "The authorities seem to hold that, without a special provision in the lease or by statute, rents are not apportioned in respect to time, so that the person who owns the reversion on the date the rent becomes due, is entitled to the entire rental matured that day. 1 Tiffany on Landlord and Tenant, Sec. 176; 2 McAdam on Landlord and Tenant (4th Ed.), Sec. 291; 24 Cyc. 1185; Russell v. Fabyan (N. H.), 61 Am. Dec. 629." See, also,

33 Am. Jur., Life Estates, Remainders, Etc., § 309, p. 813, § 310, p. 816, § 311, p. 816. As stated in 33 Am. Jur., Life Estates, Remainders, Etc., § 309, p. 813: "The general rule followed in the absence of contrary statute and in the absence of an intention in favor of apportionment appearing from the will or other instrument under consideration is that income consisting of rent money is not apportionable as between persons successively entitled, where the right of one person ends and that of another begins during a rent period."

And in 33 Am. Jur., Life Estates, Remainders, Etc., § 310, p. 816, it is stated: "If the estate of the life tenant terminates intermediate rent days, or before any rent has become due, the accruing rent becomes an incident of and is annexed to the estate of the reversioner. Whoever owns the reversion when the rent falls due is entitled to receive the whole sum, unless it is otherwise provided by contract or statute."

We think, in view of the above principles, that appellant was not liable for rents for the year 1952.

What does the evidence show was a fair and reasonable rental for these lands in 1949, 1950, and 1951? Appellee produced two well-qualified witnesses who testified a fair and reasonable rental was $20 an acre, whereas appellant produced a well-qualified witness who testified it was $10 an acre. The trial court found it to be $18 an acre and we are of the opinion that $18 an acre was the fair and reasonable rental value of these lands for each of these years or $2,790 per annum.

The appellant, during the years 1949, 1950, and 1951, paid the taxes assessed against these lands; paid for insurance on the improvements; and paid for repairs, improvements, and replacements on the property. Since it is the duty of a life tenant to pay the taxes, protect the improvements, and keep them in repair, we think the appellant should be allowed credit therefor but not for improvements or replacements. See, Spiech v. Tierney, 56 Neb. 514, 76 N. W. 1090; 31 C. J. S., Estates,

§ 44, p. 55; 33 Am. Jur., Life Estates, Remainders, Etc., § 448, p. 976, § 464, p. 1002.

As stated in Spiech v. Tierney, *supra*: "As between the life tenant and the owner of the fee, it is the duty of the former to pay all taxes charged against the land during the continuance of his estate."

Also in 33 Am. Jur., Life Estates, Remainders, Etc., § 448, p. 976: "* * * a life tenant is not bound to make 'extraordinary' repairs, such as those which involve substitution of new structures for old."

And as stated in 31 C. J. S., Estates, § 44, p. 55: "A life tenant must make all the ordinary repairs necessary to preserve the property and prevent its going to waste, but he need not make extraordinary repairs. * * * He is bound to keep the premises in as good repair as they were when he took them, not excepting ordinary or natural wear and tear, and this duty devolves on one holding under the life tenant." And in 31 C. J. S., Estates, § 45, p. 56: "A tenant for life is not bound to make any permanent improvements on the estate; * * *."

And as stated in 33 Am. Jur., Life Estates, Remainders, Etc., § 456, p. 984: "The rule appears to be well established that although a life tenant must keep the property in repair, he is under no general legal duty to make permanent improvements thereon, and according to the great weight of authority, if he makes such improvements voluntarily, he has no claim against the estate or a reversionary interest in it for compensation or reimbursement."

These items for 1949 were taxes $554.43, insurance $52.05, and repairs $162.45; for 1950 they were taxes $607.91, insurance $35.56, and repairs $55.77; and in 1951 they were taxes $773.44, insurance $92.70, and repairs $111.64. In this respect we have not allowed appellant the cost of putting in a new furnace in the house in 1951, which replaced an old one, because it is such an extraordinary repair, under the circumstances

of when it was put in, that we do not feel it should be allowed.

There is established the fact that during these 3 years the appellant advanced money to the mother and to others for the mother's care. It is apparent that this was done under and pursuant to some arrangement with the mother in relation to the appellant's use of the land. While a claim for money advanced to or for a deceased person must ordinarily be filed as a claim against the estate we think, under the circumstances here shown, appellant should be given credit for these amounts in this action for, as stated in Herrin v. Johnson Cashway Lumber Co., 153 Neb. 693, 46 N. W. 2d 111, and approved in Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131: "It is the practice of courts of equity, when they once have obtained jurisdiction of a case, to administer all the relief which the nature of the case and the facts demand, and to bring such relief down to the close of the litigation between the parties."

On July 29, 1949, appellant paid to Margaret O'Neill, with the mother's approval, the sum of $2,500 as consideration for an agreement with Mrs. O'Neill that she would take care of the mother for the rest of the mother's life; during 1949, 1950, and 1951 appellant paid the mother $1,550; on December 14, 1951, appellant paid his mother's hospital bill at St. Vincent's hospital of $155.65; and later part of her doctor bill in the sum of $50. We think appellant should be given credit for all of these sums advanced to or for the mother's use. This leaves a balance owing by appellant for the years 1949, 1950, and 1951 of $1,668.40.

Other questions are raised by appellant but in view of what we have herein held it is not necessary to discuss them. We reverse the judgment of the trial court and remand the cause with directions to enter a judgment for appellee in the sum of $1,668.40 with interest at 6 percent from date rendered and all costs in the district

court, but against appellee as to all costs of the appeal to this court.

REVERSED AND REMANDED WITH DIRECTIONS.

CHAPPELL, J., participating on briefs.

MARILYN A. WALKER COMBES, APPELLANT, V. LUELLA B. ANDERSON ET AL., APPELLEES.
81 N. W. 2d 899

Filed March 22, 1957. No. 34104.

Appeal and Error. In the absence of a bill of exceptions it is presumed that an issue of fact presented by the pleadings was established by the evidence, that it was correctly decided, and that the only question that will be considered on appeal is the sufficiency of the pleadings to support the judgment.

APPEAL from the district court for Butler County: DAYTON R. MOUNTS, JUDGE. *Affirmed.*

Charles E. Kirchner and *Tomek & Tomek,* for appellant.

Van Pelt, Marti & O'Gara, Chauncey C. Sheldon, Frederick M. Deutsch, and *Frederic J. Coufal,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Appellant seeks the recovery of damages from appellees because of injuries she sustained by collision of an automobile operated by Luella B. Anderson, one of the appellees, with an automobile in which appellant was riding with her husband, the proximate cause of which, as appellant alleges, was the concurrent negligence of appellees. The defenses pleaded by Sam Conley, one of the appellees, to the petition of appellant were a general denial and an assertion that the collision of the automobiles was proximately and solely caused by the negligence of appellant and her husband. The answer of

Luella B. Anderson and Theodore Anderson, appellees, was a denial of the assertions of the petition and an allegation that the collision of the automobiles was proximately caused by the negligence of the husband of appellant.

The trial of the issues resulted in a verdict of the jury for appellees and against appellant. A motion of appellant for a new trial was denied.

There is no bill of exceptions in this case. All presumptions exist in favor of the regularity and correctness of a judgment of a court of general jurisdiction and the litigant who asserts the contrary is required to establish the alleged defect or error by an exhibition of the record. It is only for errors appearing on the face of the record that the judgment of the district court can properly be reversed. Bryant v. State, 153 Neb. 490, 45 N. W. 2d 169; Doon v. Adcock, 127 Neb. 335, 255 N. W. 548. In the absence of a bill of exceptions, no question may or will be considered a determination of which requires an examination of evidence produced at the trial but it will be presumed that issues of fact raised by the pleadings were sustained by the evidence and that they were correctly decided. Wabel v. Ross, 153 Neb. 236, 44 N. W. 2d 312.

Appellant attempts to classify the errors she relies upon as those based upon the transcript and those based on the bill of exceptions. There are enumerated in the first class many alleged errors in instructions given by the court. This court may not determine that any instruction, however erroneous, was prejudicial since the evidence may have been such as would have justified the trial court in directing the verdict which was returned by the jury. Doon v. Adcock, *supra*.

The only question which can be presented on appeal to this court in a civil action in the absence of a bill of exceptions is the sufficiency of the pleadings to support the judgment. Neighbors & Danielson v. West Nebraska Methodist Hospital, 162 Neb. 816, 77 N. W. 2d 667. The

pleadings support the final conclusion and action of the district court in this case. It should be and is affirmed.

AFFIRMED.

JOSEPH ROLL ET AL., APPELLEES, V. LEWIS MARTIN ET AL., APPELLANTS.
82 N. W. 2d 34

Filed March 29, 1957. No. 34064.

1. **Estoppel.** Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.
2. ———. Where one by his own words or conduct willfully causes another to believe in a certain state of facts, as that he is not the owner of certain property, and thereby induces him to act on that belief so as to alter his own position, as by purchasing the same, the former is concluded from averring against the latter a different state of facts from that represented.
3. ———. Ordinarily estoppels in pais are available in favor of privies, provided the privity is created after the event out of which the estoppel arises, and provided the elements of such estoppel are present.
4. ———. Title to real estate may not be created by estoppel but a party may estop himself, after a transaction has been fully executed, from asserting that the title he, by his own acts, has created or aided in creating is not the true title.

APPEAL from the district court for Otoe County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Bernard M. Spencer, for appellants.

Edwin Moran, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for Otoe County of an action wherein the trial court held the defendants, Lewis Martin and Chiona Martin, husband and wife, had, by their words, acts, statements, representations, and conduct, forever estopped themselves from denying the title of plaintiffs, Joseph Roll, Edward Roll, and Carl Roll, in and to certain lands described in the decree and permanently enjoined the defendants from in any manner interfering with the plaintiffs' use and occupancy thereof. After the foregoing decree had been rendered defendants filed a motion for new trial and this appeal is from the overruling thereof.

Appellees, in their amended petition on which the case was tried, claimed to own the lands herein involved by adverse possession and prayed that the title thereto be quieted and confirmed in them as the owners in fee simple by reason thereof. At the conclusion of their evidence, but before they rested their case, appellees asked leave of, were granted permission to, and did withdraw this issue. However, in their amended petition the appellees properly set forth the claim upon which the trial court granted the relief that it did, which appellees had prayed for.

Since this is an equitable action it will be reviewed here de novo. In view of the record, which discloses that the trial court viewed the premises, we think the following principles have particular application:

" 'While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.' Gentry v. Burge, 129 Neb. 493, 261 N. W. 854." Higgins v. Adelson, 131 Neb. 820, 270 N. W. 502.

"This court has held that, when the court views the topography of a certain locality, its findings are entitled to great weight." Independent Stock Farm v. Stevens, 128 Neb. 619, 259 N. W. 647.

The evidence is in irreconcilable conflict on material matters. We have come to the conclusion that appellees' version of what happened is correct and will set forth the facts accordingly as it would serve no useful purpose to set out appellants' evidence that is in conflict therewith.

The lands herein involved are described by metes and bounds. We shall not set forth the rather lengthy description thereof but only state that they lie between the Chicago, Burlington and Quincy Railroad Company's right-of-way and what was Frazer's Island and are in Sections 14 and 15, Township 8 North, Range 14 East of the 6th P.M., in Otoe County, Nebraska.

Frazer's Island, also referred to in the record as Frazier's Island, was located in the Missouri River, near the Nebraska side, just below Nebraska City. In 1936 the United States government closed a channel of the Missouri River that was then flowing between the island and the Nebraska mainland. It did this by means of constructing an earthen dike across the channel. This caused the channel that was closed to fill with silt and some years thereafter the island became attached to the mainland.

The Martin family had lived on the island for many years. Their occupancy included three generations: Appellants, their children, and his parents. Sometime after the earthen dike was put in appellant Lewis Martin, whom we shall hereinafter refer to as Martin, built a fence along the west and north side of the land appellants were then occupying on the island. The fence built on the north side ran generally east and west along a wooden pile dike. It extended east to the Missouri River. The fences constructed on the west side ran generally north and south some distance east of the

channel that was closed. At the south end this north-south fence was 1,038 feet east of the center line of the railroad right-of-way and at the north end it was 608 feet east thereof. At the latter point it connected with the west end of the east-west fence along the wooden pile dike. The land here involved lies generally west and north of these two fences and they are the fences hereinafter referred to.

John McCarthy, who died on February 13, 1946, at the time of his death owned the record title to whatever land there was in Sections 14 and 15 which lay east of the railroad right-of-way and west of the Missouri River, which right-of-way was located on the Nebraska mainland and ran along the west bank of the channel that was closed in 1936. Just how much land there was between the right-of-way and the river, prior to 1936, is not shown although there was apparently some.

In the latter part of May or the first part of June 1946, while the estate of decedent John McCarthy was being administered by the county court of Otoe County, Vantine A. James, attorney for the estate, Otto H. Wellensiek, and T. Simpson Morton went to see Martin. They went to find out from him just what land decedent owned and the boundaries thereof as they related to appellants' land as James and Wellensiek were both interested in buying the land and James also wanted the information for the benefit of the heirs of the decedent. They found Martin at home and told him the reason for their coming. Martin then showed them the north-south and east-west fences he had built, walking along the north-south fence from the earthen dike north to the wooden piling dike and then east along it to the river. While doing so he told them he owned nothing west or north thereof, as that land belonged to either Woolsey or McCarthy, and that he only claimed to own the land that lay to the east and south thereof. James, relying on these statements of Martin, purchased from the heirs of decedent John McCarthy all their interests

in these lands. He paid a valuable consideration therefor. The deed of conveyance is dated April 5, 1947.

In 1948 James offered to sell these lands to appellees. Before buying this land appellees Joseph and Edward Roll made inquiries of Martin concerning it because they wanted to find out for sure what claims, if any, Martin was making thereto and what he considered the boundary lines to be. Martin told them, as he had the others in 1946, that he did not claim anything west of the north-south fence and nothing north of the east-west fence constructed along the wooden pile dike. Relying on these statements appellees, for a valuable consideration, purchased the interests of James in the lands, the deed being dated January 27, 1949.

In 1949 and 1950 appellees did considerable work on the land by breaking down the willows and other vegetation growing thereon. They did this with two bulldozers. In the summer of 1953 appellees sprayed the land by means of a plane. Some of the poisonous spray used apparently blew over onto a melon patch which Martin had east of the north-south fence and damaged it for Martin sued appellees in the county court of Otoe County on that basis. During the course of the trial Martin admitted appellees owned the land west of the north-south fence. In the fall of 1954 the appellees began clearing the area they had sprayed in 1953. They cleared some 12 to 15 acres. It was while they were doing this clearing that Martin first objected to their taking possession of the land. Martin then constructed a one-wire fence almost over to the railroad right-of-way thus, for all practical purposes, excluding appellees from the lands herein involved. This suit followed.

We find that neither Martin nor his father, Manley Martin, ever made any claim to any of the lands herein involved, until Martin did so in the fall of 1954, and that neither Martin nor his father did anything that resulted in their obtaining any rights thereto by adverse possession. In fact, it appears the first time any of the Mar-

tins attempted to take possession thereof was in the fall of 1954.

Appellants contend, since they were and are the owners of land on Frazer's Island and the area involved was the bed of the river, that they are entitled to all accretions to their land on the island to the thread of the closed channel as a matter of right; that they were not required to take possession thereof; and that failure to do so did not forfeit such right unless someone actually had established the right thereto by adverse possession. With these principles we find no fault and they are supported by the authorities cited. See, Briard v. Hashberger, 107 Neb. 199, 185 N. W. 430; Higgins v. Adelson, *supra;* Conkey v. Knudsen, 135 Neb. 890, 284 N. W. 737; Conkey v. Knudsen, 143 Neb. 5, 8 N. W. 2d 538; 56 Am. Jur., Waters, § 479, p. 895, § 477, p. 892. Of course, James and Martin or appellees and Martin could have agreed upon their respective interests in the accretions adjoining their lands regardless of their exact legal rights. See Conkey v. Knudsen, 135 Neb. 890, 284 N. W. 737. Whether or not they actually did so we do not decide for it is not material to a decision herein.

But appellees' claim of right is not based on either accretion or adverse possession but on estoppel, consequently, neither of these principles has application here. In other words, the question presented is, do the facts as herein set forth estop appellants from asserting ownership to the lands herein involved?

In a comparable situation in Blodgett v. McMurtry, 34 Neb. 782, 52 N. W. 706, we said: "The rule is, where one by his own words or conduct willfully causes another to believe in a certain state of facts, as that he is not the owner of certain property, and thereby induces him to act on that belief so as to alter his own position, as by purchasing the same, the former is concluded from averring against the latter a different state of facts from that represented."

We said in Ricketts v. Scothorn, 57 Neb. 51, 77 N. W.

365, 73 Am. S. R. 491, 42 L. R. A. 794: "An estoppel in pais is defined to be 'a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged.' Mr. Pomeroy has formulated the following definition: 'Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.' (2 Pomeroy, Equity Jurisprudence 804.)"

And in May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448, we said: " 'Equitable estoppels operate as effectually as technical estoppels. They cannot in the nature of things be subjected to fixed and settled rules of universal application, like legal estoppels, nor hampered by the narrow confines of a technical formula. So, while the attempted definitions of such an estoppel are numerous, few of them can be considered satisfactory, for the reason that an equitable estoppel rests largely on the facts and circumstances of the particular case, and consequently any attempted definition usually amounts to no more than a declaration of an estoppel under those facts and circumstances. * * * The following, however, may be ventured as the sum of all cases: That a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith, relied thereon. Such an estoppel is founded on morality and justice, and especially concerns conscience and equity.' 10 R. C. L., sec. 19, p. 689. See, also, 31 C. J. S., sec. 59, p. 236." See, also, Reed v. Williamson,

ante p. 99, 82 N. W. 2d 18; Bleicher v. Heeter, 141 Neb. 787, 4 N. W. 2d 897; Neset v. Rudman, —— N. D. ——, 74 N. W. 2d 826; Dickerson v. Colgrove, 100 U. S. 578, 25 L. Ed. 618; 31 C. J. S., Estoppel, § 63, p. 248.

As stated in Colonial Theatrical Enterprises v. Sage, 255 Mich. 160, 237 N. W. 529: " 'It has been held in many cases that if the owner of land knowingly stands by and permits his property to be mortgaged or sold by another, to one who is to the owner's knowledge relying on the apparent ownership of the person executing the conveyance, such conduct will estop the owner from asserting his title against the mortgagee or grantee.' Craig v. Crossman, 209 Mich. 462, 480."

"An equitable estoppel may be claimed by a party or privy, but not by a stranger or volunteer. * * * ordinarily estoppels in pais are available in favor of privies, provided the privity is created after the event out of which the estoppel arises, and provided the elements of such estoppel are present." 31 C. J. S., Estoppel, § 130, p. 397. In this respect appellees, as grantees of Vantine A. James, stood in privity with him as to his right to set up estoppel as a defense to any claims made by Martin.

Estoppel may be urged to protect rights, not to create them, but the principle here controlling is stated in Colonial Theatrical Enterprises v. Sage, *supra*, as follows: "In Stevens v. DeBar, supra (229 Mich. 215, 200 N. W. 978), with review of the authorities, it was said: 'This court has consistently held that title to real estate may not be created by estoppel, but in numerous cases this court has also held that a party may estop himself after the arrangements have been fully executed from asserting that the title he by his own acts has created or aided in creating is not the true title.' See, also, 50 A. L. R. 685."

Here the parties did not know what Martin claimed was his. They inquired of him in regard thereto and were informed. Relying upon such information they

acted thereon and expended their funds. To now permit Martin to assert otherwise would be inequitable and a fraud upon those who believed what he told them. We think he should be estopped from doing so. We therefore affirm the trial court's decision.

AFFIRMED.

ARCHIE D. DREW ET AL., APPELLANTS, V. CHARLES H. HAWLEY ET AL., APPELLEES.
82 N. W. 2d 4

Filed March 29, 1957. No. 34114.

1. **Specific Performance: Wills.** One seeking specific performance of an oral contract to will property to him has the burden not only of proving the contract but also that he has performed the obligations imposed upon him thereby.
2. ———: ———. An interested third person who seeks to enforce an oral contract to will property to him has the burden not only of proving the contract but also that the obligations imposed by the contract have been performed.
3. **Executors and Administrators: Frauds, Statute of.** When one claims the estate of a deceased person under an alleged oral contract, the evidence of such contract must be clear, satisfactory, and unequivocal.
4. **Wills.** Where a will is shown to have been made and left in the custody of the testator, if it cannot be found after his death, the presumption is that the testator destroyed it animo revocandi.
5. ———. The presumption that a will has been destroyed animo revocandi is one of fact, and it may be overcome by evidence, circumstantial or otherwise, to the contrary.
6. ———. The burden of proof is on the person asserting undue influence to prove by a preponderance of the evidence (1) that the grantor, testator, or donor was a person who would be subject to such influence, (2) that there was an opportunity to exercise such influence, (3) that there was a disposition to exercise such influence, and (4) that the result was the effect of such influence.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Affirmed.*

Lyle B. Gill, for appellants.

Sidner, Lee, Gunderson & Svoboda and *Robert L. Flory,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action in equity by Archie D. Drew and Frank M. Drew, plaintiffs and appellants, against Charles H. Hawley, the First National Bank of Fremont, Nebraska, a corporation, the Equitable Savings and Loan Association, a corporation, and the Nebraska State Savings and Loan Association, a corporation, defendants and appellees. The purpose of the action is to have a trust imposed upon certain moneys and properties which plaintiffs claim properly belong to them and others similarly situated by virtue of an agreement between Fred D. Drew and Nellie H. Drew, husband and wife, both now deceased, to make a joint, reciprocal, and irrevocable will, which will was duly made and was valid and subsisting at the time of their death, all of which moneys are claimed by the defendant Hawley as his own.

A trial was had to the court at the conclusion of which a decree was rendered in which it was adjudicated that the defendant Hawley was the true owner of all the money and property in question. Thereafter a motion for new trial was filed and by the court overruled. From this adjudication and the order overruling the motion for new trial the plaintiffs have appealed.

By the petition which is the basis of this action it is substantially alleged that on or about July 28, 1947, Fred D. Drew and Nellie H. Drew entered into an oral agreement to execute joint, reciprocal, and irrevocable wills whereby the survivor was to receive all the property of the two and that on the death of the survivor all of the property was to go to the plaintiffs herein and to a group of others similarly situated, whose names it is not necessary to set forth herein; that in pursuance of the agreement a will was duly made and executed on or

about July 28, 1947; that the will was never revoked by the two parties; that Fred D. Drew died on October 13, 1954, at the age of 81 years and Nellie H. Drew died June 17, 1955, at the age of 84 years; that during the lifetime of Fred D. Drew and Nellie H. Drew they had a joint bank account with right of survivorship in the First National Bank of Fremont, Nebraska, and that they held jointly stock certificates, with right of survivorship, in the Nebraska State Savings and Loan Association of Fremont, Nebraska, and the Equitable Building and Loan Association of Fremont, Nebraska, now known as Equitable Savings and Loan Association of Fremont, Nebraska; that on May 28, 1954, the signature of Charles H. Hawley was added as a joint tenant with right of survivorship to the account in the First National Bank; that on or about March 10, 1955, the certificates of stock in the amount of $8,800 in the Nebraska State Savings and Loan Association were placed jointly in the names of Nellie H. Drew and Charles H. Hawley; that the same arrangement was effected as to $1,600 in stock of the Equitable Savings and Loan Association; and that on October 15, 1954, stock certificates in the Equitable Building and Loan Association in the amount of $2,562.80 were cashed and the money deposited in the joint account in the First National Bank.

It is further substantially alleged that Charles H. Hawley became joint tenant with right of survivorship in the bank account by reason of his undue influence exercised upon Fred D. Drew and Nellie H. Drew, and in the savings and loan certificates by his undue influence upon Nellie H. Drew.

It is further alleged in substance that on account of undue influence of Charles H. Hawley, which caused him to become joint tenant with right of survivorship as described, the contract of Fred D. Drew and Nellie H. Drew was breached, the consequence of which was to deprive the plaintiffs and the others similarly situated of the money and property involved, which money and

property would have passed to them under the provisions of the will contracted to be made.

It is further pleaded substantially that the defendant Hawley has possession and control of the moneys and shares of stock in question.

The purpose of the action is, during its pendency, to restrain the bank and the savings and loan associations from paying any money to the defendant Hawley and from making any transfers of the certificates, and as to the defendant Hawley to have the agreement to make the will established and to cause the money and property in the bank and in the savings and loan associations and any money received by the defendant Hawley, by virtue of the joint tenancy with right of survivorship arrangements described, to be distributed to the plaintiffs and the others similarly situated.

The bank and the two savings and loan associations filed separate answers, the contents of which are not deemed of importance here.

The defendant Hawley filed a separate answer and an amended answer. The amended answer contains the basic contentions of this defendant. To the extent necessary to set them forth herein, he denied generally the allegations of the petition. He admitted that Fred D. Drew and Nellie H. Drew attempted to make a joint will in 1947. He alleged substantially that if Fred D. Drew and Nellie H. Drew made a will in 1947 such will was not their last will and testament as of the time of their deaths; and that the moneys and property which are the subject of controversy in this action were not the subject of testamentary disposition for the reason that they were the property of this defendant by reason of the fact that he was validly a joint tenant with right of survivorship of the bank account at the time of the death of Fred D. Drew, and that he was validly a joint tenant with right of survivorship of the bank account and the certificates of stock in the Nebraska State Savings and Loan Asso-

ciation and the Equitable Savings and Loan Association at the time of the death of Nellie H. Drew.

The plaintiffs for reply to the extent necessary to state here filed a general denial.

The district court after a trial on these issues, as has been pointed out, found and decreed that the plaintiffs had failed to sustain a cause of action against the defendants or either of them.

As grounds for reversal of this adjudication the plaintiffs have set forth numerous assignments of error. These however will not be referred to specifically since in summary they present the question of whether or not the evidence under law sustains a cause of action in favor of the plaintiffs.

In order that it may be said that the cause of action has been sustained the preponderance of the evidence first must show that there was an agreement to make a reciprocal will and that there was part performance thereof. In Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478, it was said: "One seeking specific performance of an oral contract to will property to him has the burden not only of proving the contract but also that he has performed the obligations imposed upon him thereby." See, also, Peters v. Wilks, 151 Neb. 861, 39 N. W. 2d 793.

The case at bar is not of course, in the strict sense, a case seeking specific performance as was the case of Sopcich v. Tangeman, *supra,* but it is one having the same purpose. The rule however in the class of cases wherein interested third parties are seeking to enforce such an agreement is the same. This was pointed out in Eagan v. Hall, 159 Neb. 537, 68 N. W. 2d 147. That was a case wherein a third party was seeking the benefit of an alleged oral agreement to make a will. In the syllabus it was said: "When one claims the estate of a deceased person under an alleged oral contract, the evidence of such contract must be clear, satisfactory, and

unequivocal." See, also, Wyrick v. Wyrick, 162 Neb. 105, 75 N. W. 2d 376.

The record in this case conclusively shows that on or about July 28, 1947, Fred D. Drew and Nellie H. Drew, in pursuance of an agreement, did execute a joint and purportedly irrevocable will in form and substance as contended by the plaintiffs. A stipulation of the parties unequivocally so purporting appears in the bill of exceptions.

The record fails to disclose any information as to what became of the will thereafter. As to whether or not it was destroyed or revoked by the parties there is no information. There is testimony by the defendant Hawley the effect of which is to say that at the request of Nellie H. Drew he procured for her from a safety deposit box an envelope which she said contained a will. He said he did not know what it contained and that the contents of the will, if there was one, were never disclosed to him.

This state of the record leaves the plaintiffs without evidence to sustain their burden of showing that the will of 1947 had not been revoked by Fred D. Drew and Nellie H. Drew in their lifetime. In Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 110 Am. S. R. 431, 62 L. R. A. 383, it was said: "Where a will is shown to have been made and left in the custody of the testator, if it cannot be found after his death the presumption is that the testator destroyed it animo revocandi." This pronouncement was quoted with approval in the syllabus of In re Estate of Ladman, 128 Neb. 483, 259 N. W. 50. See, also, In re Estate of Drake, 150 Neb. 568, 35 N. W. 2d 417.

Also in Williams v. Miles, *supra,* it was said: "But this is a presumption of fact only. It may be overcome by evidence, circumstantial or otherwise, to the contrary; and declarations of the testator may be shown for this purpose." This was likewise quoted with approval in the syllabus of In re Estate of Ladman, *supra.*

In the case here the presumption must prevail, since there is no evidence of any kind or character to overcome it.

It follows therefore that the plaintiffs have failed to establish any right to recover anything for themselves, or the others claimed to be represented by them, by virture of any contract to make a will entered into between Fred D. Drew and Nellie H. Drew or any will executed in pursuance of such agreement.

Assuming however that there was such a will as claimed which had not been revoked prior to the death of the makers, still on the record in the case none of the property on which it is sought to have a trust imposed could pass under the will, and for that reason the plaintiffs could not be allowed to prevail in this action.

It is not contended by the plaintiffs that in form the defendant Hawley did not take all of the property in question as the survivor of joint tenancies. It is the contention that the joint tenancies came into being as the result of undue influence of Hawley exercised upon the other tenants.

A well-settled rule as to proof of undue influence is stated as follows in Parkening v. Haffke, 153 Neb. 678, 46 N. W. 2d 117: "The burden of proof is on the person asserting undue influence to prove by a preponderance of the evidence (1) that the grantor, testator, or donor was a person who would be subject to such influence, (2) that there was an opportunity to exercise such influence, (3) that there was a disposition to exercise such influence, and (4) that the result was the effect of such influence." This rule has no exceptions. In re Estate of Hagan, 143 Neb. 459, 9 N. W. 2d 794, 154 A. L. R. 573; In re Estate of George, 144 Neb. 887, 15 N. W. 2d 80.

There is no evidence in the record either direct or circumstantial to support any of these elements except that of opportunity. The plaintiffs called no witness to testify with regard to this or, for that matter, any other

phase of the case, except Hawley. And as a witness the only inquiry made of him related to the matter of his removing an envelope and contents from a safety deposit box.

Hawley, who was a brother of Nellie H. Drew, testified in his own behalf, as did representatives of the other defendants. In none of this was there anything tending to sustain the charge of undue influence. Their testimony was all to the contrary. Also there was no evidence upon which to base a finding that there was a failure of regularity in the creation of the joint tenancies with right of survivorship by which the defendant Hawley became a tenant.

Accordingly the judgment of the district court should be and it is affirmed.

AFFIRMED.

SCHOOL DISTRICT NO. 228 OF HOLT COUNTY, NEBRASKA, APPELLANT, V. THE STATE BOARD OF EDUCATION, A BODY CORPORATE, ET AL., APPELLEES.
82 N. W. 2d 8

Filed March 29, 1957. No. 34131.

1. **Statutes.** In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary, and popular sense, should be taken into account, in order to determine the legislative will.
2. **Highways.** The word "highway" as used in section 79-701(5), R. S. Supp., 1955, means a public road of general use by the public in travel from place to place.
3. ———. The word "improved" qualifying "highway" as used in section 79-701(5), R. S. Supp., 1955, means a highway made better for travel by human effort. This includes one or more of the elements of grading, elevating or lowering a roadbed, surfacing, drainage, and like betterments.
4. ——— The word "reasonably" qualifying "improved highway" as used in section 79-701(5), R. S. Supp., 1955, means sufficiently

improved to meet the normal demands put upon its use by children of school age required to attend school regularly.

APPEAL from the district court for Lancaster County: PAUL WHITE, JUDGE. *Reversed and remanded with directions.*

Davis, Healey, Davies & Wilson, Robert A. Barlow, and *Leo F. Clinch,* for appellant.

Clarence S. Beck, Attorney General, and *Gerald S. Vitamvas,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

Plaintiff, and appellant here, is a school district in Holt County. The appellees are the State Board of Education and the Commissioner of Education. Directly, the State Board of Education is involved. We refer to it hereinafter as the defendant.

Plaintiff sought to enjoin the defendant from enforcing a ruling of nonapproval of the high school of plaintiff. The effect of the ruling was to deny high school tuition advantages to plaintiff. Plaintiff's school was also classed as a nonoperative high school. Issues were made and trial was had resulting in a judgment of dismissal of plaintiff's cause of action. Plaintiff appeals. We reverse the judgment of the trial court and remand the cause with directions.

Plaintiff operates a 10-grade school at Amelia. The ninth and tenth grades, as a 2-year high school, only are involved.

On March 1, 1956, defendant notified the plaintiff that its high school operations would not be approved for the collection of free high school tuition and would not be exempt from the free high school tuition levy for the school year 1956-1957.

The nonapproval rested on the ground of an extremely limited high school program and inadequacy of facilities.

Section 79-328(5), R. S. Supp., 1955, provides in part that the State Board of Education shall have the power to "establish standards and procedures for classifying, approving, and accrediting schools, including the establishment of minimum standards and procedures for approving the opening of new schools, the continued legal operation of all schools, and for the approval of high schools for the collection of free high school tuition money, * * *." Plaintiff challenged the constitutionality of a part of that act. The challenge rests upon our decision in School District No. 39 v. Decker, 159 Neb. 693, 68 N. W. 2d 354.

The defendant did establish criteria for approved Public Schools to be effective January 1, 1956. However, filing with the Secretary of State did not occur until June 22, 1956, almost 4 months after the letter of March 1, 1956, was written to plaintiff.

The plaintiff argues here that under the provisions of sections 84-901 to 84-906, R. R. S. 1943, these criteria are not binding upon it in any event insofar as this case is concerned. The defendant does not contend otherwise and accordingly suggests that the constitutional question is not here for determination.

The second ground for the position taken by the defendant in the notice to the plaintiff is bottomed on the provisions of section 79-701(5), R. S. Supp., 1955, which provides in part: "If for three consecutive years the enrollment of an existing Class II district shall be * * * less than ten pupils in the case of a district maintaining a two-year high school, such district shall not continue to operate * * * if such two-year high school shall be within fifteen miles on a reasonably improved highway of any high school."

It is on the above statute that defendant bases the contention that plaintiff is a nonoperative school and not entitled to free high school tuition benefits under section 79-4,103, R. R. S. 1943.

It is conceded that plaintiff is a Class II school district

and that its enrollment is less than 10 pupils in the high school grades.

The question which we are asked to decide requires the construction of the provision which is that the district shall not continue to operate if it is "within fifteen miles on a reasonably improved highway of any high school."

The nearest high school to Amelia is at Chambers. There are two roads between Amelia and Chambers. One road is to go west from Amelia along an improved road, formerly a part of the state highway system, then south, and then east along an improved state highway. That distance is about 17 miles. The other is to go east from Amelia a half mile, thence south 2 miles, and thence east to Chambers on the state highway. This distance is about 11 miles. In miles the second road is within the 15-mile requirement of the statute. The question is: Is it a "reasonably improved highway"?

Section 79-701, R. S. Supp., 1955, was introduced in the 1953 Legislature as LB 313 as an amendment to section 79-701, R. R. S. 1943. So far as material here, as introduced it provided "that no existing Class II district shall continue to operate if the high school enrollment in that district is * * * less than twelve pupils in districts maintaining a two-year high school."

The Education Committee reported the bill with an amendment providing that "if, for three consecutive years the enrollment of an existing Class II district shall be * * * less than ten pupils in the case of a district maintaining a two-year high school, such district shall not continue to operate * * * if such two-year high school shall be within fifteen miles of any high school." Nebraska Legislative Journal, 1953, p. 645.

The Education Committee, in its statement to the Legislature, said: "The bill is also amended so that no such district would be closed unless there was a high school within a 15 mile radius."

When the bill was considered on General File the

words "on a reasonably improved highway" were inserted following the words "fifteen miles." Nebraska Legislative Journal, 1953, p. 771.

This review of the history of the bill demonstrates a consistent purpose of the Legislature to relax the terms of the bill as proposed as to number of pupils enrolled, the period of time calculated as to the enrollment, the distance between schools, and finally as to the quality of the highway or highways involved in calculating distances. It evidences a legislative intent to protect the small enrollment high school and pupils from the results that would follow from the application of the strict provisions of the bill as originally introduced.

This brings us to a construction of the clause "a reasonably improved highway." Here the Legislature used words of common usage and understanding to express its intent. As was said by the Supreme Court of the United States in Sproles v. Binford, 286 U. S. 374, 52 S. Ct. 581, 76 L. Ed. 1167: "The use of common experience as a glossary is necessary to meet the practical demands of legislation."

The books give us little help in reaching an answer to the meaning of the clause. Here we must draw upon common experience in reaching an understanding of the terms used.

We have expressed the rule as follows: "In the construction of a statute, effect must be given, if possible, to all of its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary, and popular sense, should be taken into account, in order to determine the legislative will." Nacke v. City of Hebron, 155 Neb. 739, 53 N. W. 2d 564.

The word "highway" is one of variable meaning. We think it clear that the Legislature did not use the word in the sense of a highway designated as a part of the state highway system as defined in section 39-1302, R.

S. Supp., 1955. To so construe it would be to restrict its obvious meaning as used here.

The Legislature in section 39-226, R. S. Supp., 1955, provided that primary county roads shall include direct highways leading to and from rural schools where 10 or more grades are being taught. There the words highway and road are used somewhat interchangeably.

As here used, we think the word highway means a public road of general use by the public in travel from place to place. In fact the Legislature in section 39-210, R. R. S. 1943, uses the term highway in reference to graveling of a highway which connects any unincorporated village with a paved or graveled state or county highway. The road here involved fits that description. When "passable" it is of general use by the public. We conclude that the shorter road involved here is a highway within the meaning of section 79-701(5), R. S. Supp., 1955.

This brings us to the construction of the word "improved" which qualifies "highway" in the act. We think it is used here in the sense of being made better for travel by human effort.

This includes one or more of the elements of grading, elevating or lowering a roadbed, surfacing, drainage, and like betterments. The extent of the improvement required is indicated by the qualifying word "reasonably."

We think the word reasonably is here used in the sense of sufficiently. That is, the highway must be improved sufficiently to meet the normal demands put upon its use by children of school age required to attend school regularly. An element to be considered in this determination is the use of the automobile by school children as a common means of transportation. The Legislature has recognized that fact. It has provided in section 60-407(2), R. S. Supp., 1955, for probationary operator's licenses to minors between the ages of 16 and 20 years. In section 60-407(3) the Legislature has provided that a

minor over the age of 14 years (with certain exceptions) may be issued a limited permit to drive a motor vehicle to and from the school building where he attends school if he lives a distance of 1½ miles or more from such school.

The issues here relate themselves to the road east from Amelia one-half mile, thence south 2 miles to where it connects with the state highway. The land over which this road passes is over a water basin where flowing wells are common. The water table is near the surface. The soil is a light sand-powder, as described by one witness. It blows readily with the wind. The building and maintenance of improved roads under these conditions require grading and elevating of a roadbed, then covering its surface with clay, and then placing on top of that gravel or other hard surface material.

For the first half mile east of Amelia and a short distance to the south, the road had been graded and elevated recently preparatory to surfacing with clay and gravel. A county supervisor testified that he expected to get clay and gravel for and to put it on that portion of the road, and that without it the life of the grade would be about 90 days, the reason being that the uncovered sand in the grade would blow away in about that time.

At the south end of the north-and-south 2 miles is a short length of road about which no particular complaint is made. In between these two sections of the road on the north-and-south portion is a strip of road from 1 mile to 1½ miles in length that must meet the test of being a reasonably improved highway if the decision of the trial court is to be sustained.

This traveled portion of the road is described, without dispute, as being from 1 to 6 feet below the surface of the land on either side. Witnesses refer to it as a channel where the traveler is expected to move along the lowest part of the road. The reasonable inference is that this depressed roadbed has resulted from the light sand being blown away.

There is no evidence that any effort has ever been made to improve that part of the road. It affirmatively appears that for 15 years last past it has never been regraded or reshaped. It further affirmatively appears that the county is without funds to do it and has no present intention of improving this section of the road.

It further appears, without dispute, that this section of road, being below the surrounding land, fills readily with snow, blocking its use more quickly than an elevated road, and making snow removal more difficult. It is a road that the officials deem of secondary importance in removing snow when snow blocks occur.

It further appears that when the frost goes out of the road in the spring that this section has "no bottom" and its use by automobiles is impossible as a result on those occasions.

The road is without adequate drainage. In times of heavy rainfall water flows into the road from the surrounding land and has no outlet save when it rises above the level of the surrounding land. One witness testified that under those conditions the road has been impassable to automobiles for periods of from 1 hour to 3 days at a time.

Several witnesses testified that the total number of days in a year when the road would be impassable would be from 10 days to 3 weeks or more. No witness testified that it is more than a "passable" road at any time.

Other witnesses testified that during the time the road is impassable for any of the above reasons that it has been necessary either to use the longer road or to take children to school by the use of a tractor, driving out in the fields, sending them by horseback, or having them walk.

We find no fact basis in this record to support a finding that this length of road is a reasonably improved highway within the legislative intent. In fact it is not an improved highway in any sense. Man's use and na-

ture's forces have worsened instead of bettered it for travel.

The order of the defendant holding that plaintiff's high school is a nonoperative school is without statutory authority under section 79-701, R. S. Supp., 1955. The defendant here rests the validity of its order and the judgment of the trial court on that provision.

Accordingly the judgment of the trial court is reversed and the cause remanded with directions to render a decree in accord with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

RALPH W. SLOCUM, ADMINISTRATOR OF THE ESTATE OF MARY BOHUSLOV, DECEASED, APPELLANT, V. FRANK BOHUSLOV, APPELLEE.

82 N. W. 2d 39

Filed March 29, 1957. No. 34136.

1. **Life Estates.** The owner of a life estate is entitled to all the income from the property.
2. ———. If the life tenant acquires other property by investment of the income, such property is subject only to his disposition of it.
3. **Banks and Banking.** Section 8-167, R. R. S. 1943, was intended for the protection of banks but it also establishes the property rights of the persons described therein unless the contrary is expressed by the terms of the deposit.
4. **Banks and Banking: Joint Tenancy.** If a deposit is made in a bank payable to two persons, either expressly as joint tenants with right of survivorship or without those or similar qualifying words, upon the death of one of the co-owners of the deposit it becomes the sole property of and is payable to the surviving co-owner.
5. **United States: Contracts.** A United States savings bond is a contract between the federal government and the purchaser and Treasury Department regulations governing such bonds are incorporated into the contract by reference and are beyond the reach of state law to modify or destroy.
6. ———: ———. If a United States savings bond is registered in the names of two persons as co-owners, the rights of the surviving co-owner arise solely by contract.

7. ———: ———. A surviving co-owner of a United States savings bond takes title thereto as sole owner by reason of Treasury Department regulations incorporated in the contract between the federal government and the purchaser of the bond.
8. Trusts. The burden of establishing a constructive trust is upon the litigant who asserts the existence thereof by evidence that is clear, satisfactory, and convincing.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

Robert A. Nelson and *Richard H. Williams,* for appellant.

John E. Mekota, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Appellant seeks an adjudication that described personal property was owned by Mary Bohuslov at the time of her death; that appellant is entitled to the possession of it; that a trust be impressed on it in favor of appellant; and that an accounting be had of money used by appellee in the purchase of other designated property that is now occupied and used by him and of all income and amounts received by appellee from the property listed and described in this case as belonging to the deceased at the time of her death.

Frank Bohuslov, Sr., a resident of Lancaster County, died testate October 6, 1915. His heirs were Mary Bohuslov, his widow; Frank Bohuslov and Emil Bohuslov, his sons; and Christina Bohuslov, his daughter. The will of the deceased was admitted to probate and his estate was administered by proceedings had in the county court of Lancaster County. These proceedings terminated February 7, 1917. The deceased, by his will, gave all his property to his widow for her use and benefit during her life and the remainder equally to his three children. The children of the deceased were re-

spectively 21 years, 19 years, and 12 years of age at the time of the death of their father.

Mary Bohuslov, a resident of Lancaster County, died intestate August 4, 1953. Her children, Frank Bohuslov, Emil Bohuslov, and Christina Kraus, whose maiden name was Christina Bohuslov, were adjudged January 13, 1954, to be her heirs by the county court in which proceedings are pending for the administration of her estate. Appellant is the duly appointed and qualified representative of the estate of Mary Bohuslov, deceased.

Frank Bohuslov, Sr., owned the north half of Section 31, Township 9 North, Range 5 East of the 6th P. M., Lancaster County, Nebraska. He and his family were living on the land when he died. His widow and three children continued to do so and by their joint efforts operated the farm and carried on the activities appropriate to the land except Emil Bohuslov left and was at Sargent, Nebraska, during the months of December 1916 and January 1917; at Huron, South Dakota, during the months of September and October 1918; and at Crete, Nebraska, during the months of November and December 1918 and January and part of February 1919. They were industrious, diligent, and frugal. Mary Bohuslov, hereafter sometimes designated deceased, with the assistance of her daughter, did the housework and they did additional work on and about the farm. The income realized was put in one fund. There was no compensation as such paid to any of them. What they received was substantially limited to the necessities of life. The mother was in charge. She handled the finances, made all purchases, and paid all expenses. There was a mortgage of $2,700 on the farm. The indebtedness secured by it was paid and the mortgage discharged probably during the year 1917. This situation continued until March of 1920. About March 20, 1920, Emil, without warning to his older brother, departed, took the family automobile, and disposed of it. The other members of the family were left without means of trans-

portation. Emil went to California but this was not known at that time. He says the first time he communicated with his mother after he left in March 1920 was in April 1921. Appellee says Emil was not heard from until 1925. In any event he severed his residence on the home place and had nothing thereafter to do about or with any of its activities or concerns except he made three visits there, one in 1925, one in the summer of 1928, and the third and last in 1940. The mother continued to live at the same place for 13 years after that but he did not see or visit her, neither did he attend her funeral, though he asserts that their relationship was normal and affectionate.

The deceased in 1920 desired to be relieved of looking after matters concerning the property, finances, and operation of the farm and home and secured appellee to take over these responsibilities. She had handled these matters since the death of her husband. She did banking business at the City National Bank of Crete and at Denton as long as there was a bank there. She did the buying of necessary things and she paid the bills. In short, she took over where her husband left off and carried on until appellee, at her request, relieved her in the year 1920. He thereafter had charge of and conducted all the transactions and performed all things necessary or incidental to the affairs in which his mother or he was interested. He did, however, fully inform and consult with his mother about each matter before he acted concerning it through the years thereafter until her death.

Christina Bohuslov was married to Joseph J. Kraus in September 1925. She and her husband moved on a farm a few miles from the place where her mother and appellee resided. She was frequently at the home place. She had a normal relationship with her mother. She sold to appellee and she and her husband on March 21, 1942, conveyed to appellee by deed all her title and interest in the land owned by her father at the time of

his death, and she sold and conveyed to appellee on that date all her interest in the personal property belonging to her father at the time of his death or belonging to his estate. The consideration paid her by appellee for the property she sold and conveyed to him was $3,200. There is no indication in the record that she was not satisfied with that transaction. She was not consulted about and she had no part in the proceedings to administer the estate of her mother commenced by her brother Emil or in this litigation.

In the period of about March 1925 through April 1927 Emil received from appellee $3,416. The first remittance to Emil was $600 in March or April 1925. He could not say while a witness who signed the check representing that remittance but it was probably appellee as he claims since he had charge of all finances and had been making all payments since 1920. Emil on this account executed and delivered a note, dated January 2, 1928, payable to appellee or order, 12 months after date, at The City National Bank of Crete, with interest at 4 percent per annum, for the sum of $3,416. This note or any part of it has not been paid to appellee. Emil insisted that appellee buy his interest in his father's estate. He demanded $5,500 for it. If appellee did this he had to borrow a part of the amount. He consulted the City National Bank of Crete of which he was a customer. The bank refused to make a loan for that purpose because it considered the amount required out of reason when compared to the value of the property. The mother of appellee urged him to pay Emil the $5,500. "She said to give that to him. She told me, 'You get this money and give it to him, and he is going to leave us alone. He will be paid off.'" The mother asked appellee to approach the Crete State Bank and seek a loan. He did and he secured a loan from that bank and paid the $5,500 for which he took from Emil and his wife a deed dated November 18, 1931, for all his title and interest in the land owned by his father

at the time of his death, and a bill of sale dated November 18, 1931, from Emil for all his interest in the personal property. Emil received and has retained the consideration paid by appellee.

Appellee purchased the south half of the southeast quarter of Section 25, Township 9 North, Range 4 East of the 6th P. M., Seward County, Nebraska. The deed, dated February 17, 1920, was made to him as grantee. The deceased knew when this land was to be sold and she talked with appellee concerning it. She advised him to go over and buy it. He acted upon her advice and bought the land for $5,600. There was no objection or complaint from anyone at that time because the title to it was put in the name of appellee. He borrowed the money from the City National Bank of Crete and the State Bank of Denton to pay the purchase price. The former was given a first mortgage on the land and the note to the Denton bank was not secured. The notes were paid from the income realized from the farming operations carried on by appellee of the land owned by his father at the time of his death and the 80 acres of land purchased by appellee. The two places were used as a unit and the income from each was placed in one fund. Appellee conveyed the 80 acres of land bought by him to his mother by deed which was acknowledged November 22, 1928. It was promptly recorded in the public records of Seward County. The deceased conveyed the 80 acres of land to appellee by warranty deed dated December 5, 1929. It was recorded without delay in the proper public records. The deceased had full knowledge and realization of all the facts concerning this land and the transactions involving it. She participated in and approved what was done and the final result was exactly what she desired.

In the period from October 1942 through December 1952 appellee bought 47 United States bonds. They were issued and continued, as suggested and requested by the deceased, with Frank Bohuslov or Mary Bohuslov as

payees. The deceased had full knowledge as to all facts concerning them and she approved and acquiesced therein. The facts were her choice and as she wanted them. She saw many of the bonds and all the checks received in payment of interest on them. She made and kept her personal record of the bonds and knew exactly how many there were. There was a deposit account in the City National Bank of Crete in the names of Frank Bohuslov or Mary Bohuslov at the time of her death.

The district court found generally for appellee and against appellant; that appellant had no interest in and was not entitled to the possession of any of the property involved in this case except certificate No. 5578 representing 24 shares of stock of Nebraska-Iowa Packing Company in which appellee disclaimed any interest; and that a trust should not be impressed upon the property in favor of appellant. A judgment was rendered in harmony with the findings and the case was dismissed. A motion by appellant for a new trial was denied and he contests the correctness of the judgment by this appeal.

The essence of the claims of appellant is that the personal property involved herein, and described in detail in a copy of an inventory attached to and made a part of his amended petition, represents and resulted from the income of the life estate of Mary Bohuslov in the property given to her by the will of her deceased husband; that title to the property was owned by Mary Bohuslov at the time of her death; that it constitutes assets of her estate although possession and the legal title thereto may be held by appellee; that appellee has continued in the possession of and enjoyed all the income from all the personal property described herein as aforesaid since the death of his mother; and that deceased, an uneducated person without knowledge of business affairs and only slight knowledge of the English language, was the victim of fraud and undue influence perpetrated by appellee, and he thereby took title to the property in-

volved in his name and because thereof a trust should be impressed thereon in favor of appellant. Appellee denies the claims of appellant, pleads the statute of limitations, and asserts that he is rightfully in the possession and is the owner of the property by absolute title.

Appellant makes no claims herein for recovery of any personal property received by Mary Bohuslov from the estate of her deceased husband by virtue of the will of the deceased or for the value thereof. This is not important because appellee became the owner of all the property owned by his deceased father, except the life estate given to his mother therein, when he purchased and received conveyances therefor from his brother and sister.

The testator did not direct that his estate be held in trust for his widow, Mary Bohuslov. He gave her the full, unrestricted possession, use, enjoyment, and benefit thereof during the term of her natural life. She did not take a life estate in the property of the testator as trustee. She, as life tenant, was entitled to and owned by absolute title everything in the nature of income, profit, and gain realized or accrued from the property during her tenancy. The testator did not express or indicate a contrary intent by the language of his will. In Ellis v. Flannigan, 279 Ill. 93, 116 N. E. 618, the Illinois court said: "The devise of a life estate in property carries with it the unrestricted use of the income, and property purchased with the income is not subject to the terms of the will in the absence of some provision to that effect." In the opinion this language appears: "The testator declared his purpose to be to secure a sure and permanent support for his wife during her life. In carrying out this purpose he gave to her a life estate in all his property * * *. Being the owner of the life estate she was entitled to all the income from the property and was under no obligation to account for it to anyone. * * * The gift of the life estate carried with it the unrestricted use of the income * * *. If she

was able from the income of her husband's estate, either with or without her own earnings, to acquire other property, such property was not subject to the provisions of his will but was subject to her own disposition." See, also, In re Estate of Wecker, 123 Neb. 504, 243 N. W. 642; Milner v. Brokhausen, 153 Iowa 560, 133 N. W. 1068; Whitehill v. Whitehill, 211 Iowa 475, 233 N. W. 748.

The deposit account of $3,070.40 in the City National Bank of Crete was in the names of Frank Bohuslov or Mary Bohuslov at the time of the death of the latter. The deposit became the sole and absolute property of appellee, the surviving co-owner, at the time of the death of the other co-owner on August 4, 1953. The relevant part of section 8-167, R. R. S. 1943, is: "When a deposit in any bank * * * is made in the name of two * * * persons, * * * payable to either or to their survivor, * * * such deposit * * * may be * * * paid to either of said persons or to the survivor * * *." The statute was intended for the protection of banks but it also establishes the property rights of the persons described therein unless the contrary appears from the terms of the deposit. If a deposit is made in a bank payable to two persons, either expressly as joint tenants with right of survivorship or without such qualifying words, upon the death of one of the co-owners of the deposit it is payable to the surviving co-owner of the deposit. McConnell v. McCook Nat. Bank, 142 Neb. 451, 6 N. W. 2d 599; Rose v. Kahler, 151 Neb. 532, 38 N. W. 2d 391; Scriven v. Scriven, 153 Neb. 655, 45 N. W. 2d 760; DeForge v. Patrick, 162 Neb. 568, 76 N. W. 2d 733.

Appellee, upon the death of his mother, became the sole owner of the United States savings bonds payable to and issued in the names of Frank Bohuslov or Mary Bohuslov and hereinbefore described. A United States savings bond is a contract between the federal government and the purchaser and Treasury Department regulations governing such bonds are incorporated into such

contract by reference and are beyond reach of the state law to modify or destroy. If such bonds are issued and registered in the names of two persons as co-owners, the rights of a surviving co-owner arise solely from the contract. The surviving co-owner of the bonds takes title thereto by reason of Treasury Department regulations incorporated in the contract between the government and the purchaser. 31 U. S. C. A., § 757c, p. 622; § 315.45, 31 C. F. R. (1949 Ed.); Rohn v. Kelley, 156 Neb. 463, 56 N. W. 2d 711; United States v. Dauphin Deposit Trust Co., 50 F. Supp. 73; In re Bartlett, 71 F. Supp. 514; Annotations, 168 A. L. R. 245, 173 A. L. R. 550.

The property involved herein was in the exclusive possession and control of appellee on the land operated by him, except the bonds and the deposit in the bank, when appellant made a list of it and filed it in the estate of the deceased as an inventory of the property of her estate. The petition of appellant upon which this case was tried concedes that title to the property is in appellee except the bonds were jointly in the names of appellee and the deceased. There is no proof that any of this property was on the land or in existence when appellee, at the importunity of his mother in the year 1920, took charge of the land and its operation, activities, and transactions incidental thereto.

His manner of operation was identical with what it would have been if he had owned all the land he used and no other person was interested therein or in his actions or transactions except he did consult with his mother with whom he lived and for whom he cared. The income from his operations and transactions was deposited for many years in his individual deposit account. He alone withdrew funds from it. He bought, sold, planted, and harvested as his judgment dictated. He acted in his name as an individual and a principal. He reported the property as his for assessment and taxation and he paid the taxes thereon. He made income tax returns in which all the income was reported as the income

of appellee. The deceased was listed therein and treated as a dependent. Appellee paid all expenses that accrued including those for the care, support, and comfort of his mother. The record is convincing that she knew and understood what was done by appellee; that she realized fully the effect and result thereof; and that she consented to, approved, and acquiesced therein. The record seems clear that appellee did exactly what his mother intended and desired. The essence of what transpired between the deceased and appellee was that the property should be his subject to his obligation to furnish his mother, at his expense, all her requirements for care and support throughout the remainder of her life. The evidence is that appellee gave his mother every attention, care, support, and comfort that he had the opportunity and capacity to do and that he never failed to respond to her desires and wants.

He lived on the home place with his mother from soon after the death of his father in 1915 until her death in 1953. He did substantially all the work required to carry on the farming operations except for some assistance for limited times in the busiest seasons. He labored from 12 to 13 hours, and many times longer, during the 6 work days of the week and a half-day on Sunday. In addition to his many farming duties he did much of the housework, including cooking. He was outside the State of Nebraska but once when he went into the State of Iowa for a limited time. He was never farther away from the home place in Nebraska than a trip to Omaha and one to Banner County. He never had a vacation of any kind or duration. He was about 60 years of age when his mother died and he was unmarried. His sole diversion, recreation, or entertainment was a visit to the motion picture theatre in Crete sometimes as much as twice a month at an admission expense initially of 25 cents. Later the admission charge was advanced to 50 cents and he looked upon this as an extravagance. He was

thrifty and frugal to a fault. He bought his last suit and a lightweight overcoat in 1929 and has bought none since. The suit was made in Cincinnati, Ohio. Years after its purchase it was returned to the maker to be repaired and overhauled. He repaired an automobile which had been abandoned as impossible of further use when his brother disposed of the Dodge car, the family automobile, in 1920 and appellee used the repaired car continuously for a period of 5 years thereafter as his only means of transportation. His present means of transportation is a 1948 Ford truck. He never had a corn-picker or a milking machine but he milked as many as 12 to 25 cows by hand. Appellee received no compensation as such for the labor and services he performed and rendered during the period of more than a third of a century between the death of his father and the death of his mother. There is uncontested evidence in the record that the reasonable value of these was more than the probable value of the property involved.

Appellant says that a trust should be impressed upon the property, the subject matter of this litigation, because the deceased was uneducated and had little knowledge of the English language, and appellee exerted fraud and undue influence upon her. Appellant asserts that appellee usurped the management of her business affairs; fraudulently took title in his name to the Seward County land and the personal property other than the bonds and the bank deposit; and fraudulently took title jointly in the names of Frank Bohuslov or Mary Bohuslov to the bonds and the deposit. These charges are unsupported by evidence. The deceased was not an uneducated person. She spoke the English language and the Czech language with equal ease and fluency. She took and read several publications including the Lincoln Daily Star, Nebraska Farmer, Capper publications, Journal Stockman, and others printed in English. She subscribed for and read one paper in the Czech language published in Chicago. She intelligently discussed

with others matters she had read in these publications. There is evidence of a bank official that when her husband came to the bank to transact business, the deceased was invariably with him and she generally transacted the business with which she and her husband were concerned; that she was a very competent woman; and that she was capable of transacting any ordinary business. There is much other evidence to the same effect concerning the qualifications and capabilities of the deceased to transact business.

The rule is well established and has been frequently applied as in Box v. Box, 146 Neb. 826, 21 N. W. 2d 868: "If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title." See, also, Peterson v. Massey, 155 Neb. 829, 53 N. W. 2d 912. However, the principle which is decisive of this case is stated in Peterson v. Massey, *supra,* in this manner: "The burden of establishing a constructive trust is always upon the person who bases his rights thereon and he must do so by evidence that is clear, satisfactory, and convincing." Appellant has not satisfied the burden thus imposed. The charge of fraud is wholly unsupported. The only element of undue influence concerning which it may be said there is any evidence is opportunity to exert undue influence because appellee lived with his mother. There is a failure of proof as to each of the three remaining elements of undue influence. In re Estate of Bainbridge, 151 Neb. 142, 36 N. W. 2d 625. There is a failure of proof that appellee had any disposition or desire to improperly influence his mother, to act unjustly toward her, or that he did so.

The judgment should be and it is affirmed.

AFFIRMED.

BONNIE BELLE KOEHN ET AL., APPELLEES, V. ADELLA MARTHA KOEHN ET AL., APPELLANTS.
81 N. W. 2d 900

Filed March 29, 1957. No. 34143.

1. **Witnesses.** In construing section 25-1202, R. R. S. 1943, the testimony of a witness as to a transaction or conversation had by him with a person since deceased is inadmissible in any civil action or proceeding in the result of which such witness has a direct legal interest, when the adverse party thereto is the representative of such deceased person, unless and until the evidence of such deceased party, in regard to such transaction or conversation, shall have been taken and read in evidence by such representative, or unless the latter shall have first introduced a witness who shall have testified to such transaction or conversation.
2. **Trial: Appeal and Error.** In an equity case tried to the court, the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was introduced when there is relevant and competent evidence in the record to sustain the judgment of the trial court.
3. **Equity: Trial.** A court of equity will consider the purpose and not the form, and that the particular form or words of a conveyance are unimportant if the intention of the parties can be ascertained.
4. **Deeds: Mortgages.** A deed of real estate, absolute in form, may be shown by parol to have been intended by the parties to it as security for a debt or loan, and as between such parties, at least, the instrument will be construed to be a mortgage.
5. **Mortgages.** If the evidence shows that an instrument is intended by the parties to be security for a debt it is in equity, without regard to its form or name, a mortgage.

APPEAL from the district court for Cheyenne County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

John Peetz, Jr., and *F. L. Balderson*, for appellants.

P. J. Heaton, Sr., for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action in equity brought in the district court for Cheyenne County by Bonnie Belle Koehn in her own behalf and as guardian of David Darrell Koehn and Dean William Koehn, minors, and P. J. Heaton, Jr., administrator of the estate of Darrell William Koehn, deceased, as plaintiffs, against Adella Martha Koehn and William Koehn, her husband, defendants. The purpose of the action was to quiet title in Bonnie Belle Koehn, David Darrell Koehn, and Dean William Koehn, the only heirs at law of Darrell William Koehn, deceased, to certain real estate; that possession of the real estate be delivered to P. J. Heaton, Jr., administrator of the estate of Darrell William Koehn, deceased; and that the defendants be required to account for all rentals collected from said premises. Trial was had to the court. The court found that the deceased left surviving him as his only heirs at law his widow, Bonnie Belle Koehn, and his two minor sons, David Darrell Koehn and Dean William Koehn; and that the plaintiffs were entitled to have quieted in them the title to the real estate here involved and that possession thereof be delivered to the administrator of the estate of the deceased. The defendants filed a motion for new trial which was overruled. From the order overruling the motion for new trial, the defendants have appealed.

The plaintiffs allege in their petition that at the time of his death, Darrell William Koehn was the owner of Lot 2, Block 1, Paine's Addition to Sidney; that the defendants were in control and possession of said premises and refused to relinquish possession of the premises to the plaintiffs; that the defendant Adella Martha Koehn claims title and right of possession in and to said premises by virtue of a deed delivered July 16, 1951; that the title to said premises was conveyed by Darrell

William Koehn and Bonnie Belle Koehn to Adella Martha Koehn; that William Koehn claims an interest and right of possession in the premises as the husband of Adella Martha Koehn; that the deed was in truth and fact a mortgage; that some time prior to July 16, 1951, the deceased executed and delivered a promissory note representing an indebtedness owing to the defendants; that to secure the promissory note Darrell William Koehn and his wife Bonnie Belle Koehn executed and delivered a deed to Darrell William Koehn and Adella Martha Koehn in survivorship with a distinct agreement and understanding and upon the condition that upon the payment of said debt Adella Martha Koehn would reconvey said premises to the grantors; that during the lifetime of Darrell William Koehn said indebtedness was paid in full and the interest of the defendants in the premises ceased; and that the defendants refused to reconvey said premises to the heirs of Darrell William Koehn, deceased.

The defendants allege in their answer that all rents collected by them were paid to the Sidney Federal Savings and Loan Association which holds a first mortgage on the premises; that the rents collected were paid to the association for the mutual benefit of all parties concerned; that the defendants have received no money as payment upon the indebtedness still existing for which a promissory note was made by Darrell William Koehn and given as security for money owing the defendants; and that there is due and owing the defendants by reason of such indebtedness the approximate amount of $3,693.75, including interest.

The defendants in their cross-petition, in substance, allege that if they have a mortgage only on the real estate described in the plaintiffs' petition, they are entitled to a strict foreclosure by reason of nonpayment of the indebtedness of Darrell William Koehn to them, as the deed was given as security for the debt. The amount of the indebtedness is set forth. The defendants

pray that the plaintiffs' action be dismissed and that title to the property described in the plaintiffs' petition be quieted in Adella Martha Koehn, subject only to the mortgage to the Sidney Federal Savings and Loan Association, or, in the alternative, the defendants be granted a strict foreclosure of the plaintiffs' equity of redemption and a judgment for any deficiency which may result by reason of such foreclosure.

The plaintiffs' reply to the answer and cross-petition was a general denial.

For convenience we will refer to the parties at times as they were designated in the district court; to Bonnie Belle Koehn as Bonnie; to the defendant Adella Martha Koehn either as Adella Koehn, or mother; to William Koehn as father; to Darrell William Koehn as Darrell or the deceased; and to P. J. Heaton, Jr., as administrator.

The secretary-treasurer and managing officer of the Sidney Federal Savings and Loan Association located in Sidney, hereafter called the loan company, who has charge of the records, testified that the loan company holds a mortgage on Lot 2, Block 1, Paine's Addition to Sidney, known as the Koehn property. The mortgage is dated July 19, 1951, and was for the sum of $6,500. The makers of the mortgage were Darrell Koehn, Bonnie Belle Koehn, William C. Koehn, and Adella Martha Koehn. The date of the distribution of the proceeds of the loan was October 5, 1951. This distribution consisted of checks which were issued and made payable as follows: Legal fees, or attorney's fees, $10; appraisal fee $10; abstracting and recording $14.25; check to the Thomas Lumber Company $2,348.12; check to Darrell Koehn for $3,250; and a check to Darrell and Adella Koehn for $867.63, making a total of $6,500. The amount due on the mortgage in July 1956 was $4,343.40. The loan company had received rental payments from the tenant on the premises which it applied to payment of taxes, interest, and insurance, and any excess there-

over was applied to the principal of the loan.

It was stipulated that the property was appraised August 25, 1951, at $10,000.

The administrator testified that the assets of the estate, by sale of the personal property, amounted to $904.71. The total claims filed against the estate amounted to $4,681.59. William Koehn and Adella Koehn filed a claim against the estate for $3,000, based on a promissory note. He had requested the parents of the deceased to turn over to him, as administrator, the personal property and effects belonging to the deceased at the time of his death, among which was a red Manila envelope containing some important papers, which he did not receive.

Bonnie Belle Koehn testified that she and Darrell were married August 22, 1948, and divorced in June 1954. The divorce had not become absolute at the time her husband was killed in a truck accident on November 4, 1954. She testified to the birth of the two minor children and that they were the beneficiaries of their father's insurance which had been collected for their benefit. At the time she was married to Darrell he owned Lot 2, Block 1, Paine's Addition to Sidney. There was a partially finished basement on the lot. During the period of their married life they built a house on the lot, which was completed in August 1951. She and Darrell did some considerable amount of work in the construction of the house. Later they procured a loan from the loan company. She furnished the administrator with a list of the personal property her husband owned at the time of his death, among which was a red Manila envelope containing his important papers. She was acquainted with the fact that Darrell's mother and father filed a claim for $3,000 against her husband's estate. This was for a note which represented the initial cost of the basement and a bill at the Cheyenne County Lumber Company. She did not sign the note. She further testified that she did participate in the ex-

ecution of a deed of this property to Darrell's mother, which was signed in an attorney's office; and that prior to signing the deed she had a conversation with Darrell and his mother, while the three of them were in a car en route to the attorney's office, in which she asked why the deed was going to be in Darrell's name and in his mother's name. She testified: "They told me it was to be sure we would pay them back the $3000. And I said, 'When it is paid then we will get it back in my name without any argument?' And Darrell said 'Yes', and Darrell's mother said 'Yes'." After that conversation she went to the attorney's office and executed the deed. She further testified as to payments made on the note. Darrell worked for his father part-time. He also worked for the fire department and for the police force, and in addition did some cement work. He had some back wages coming from his father as shown by time slips which she and Darrell went over and from which they made a computation and arrived at a figure of $800 or $900 they owed Darrell's parents. Darrell gave his mother $1,000, and Bonnie testified that she saw the receipt for this amount and that the receipt was among Darrell's personal belongings which were in the red Manila envelope. This computation was made about the time the loan was completed with the loan company. After the loan was completed, Darrell's parents did not make claim of ownership of the premises. They only did so after Darrell's death.

On cross-examination she testified that she was not present at the time the $3,000 note was made and delivered by Darrell to his folks, but Darrell told her about it the same day.

William Koehn testified, by deposition taken by the plaintiffs, that Darrell was not the owner of Lot 2, Block 1, Paine's Addition to Sidney; that Darrell and his mother were the owners; and that he bought the lot and later completed a basement house on it and made it livable. The property was purchased in 1948, and he

believed he paid $1,490 for it. He had a deed made out to Darrell. The house was completed in 1951. He engaged in cement work, gravel hauling, and excavating. Darrell did work for him, and was paid as anybody else who worked for him had been paid. He owed Darrell nothing. Darrell never paid him anything on the note. He further testified that he told Darrell the only way he could go ahead and build the house was to deed the property back to his mother and give him a note for the equity he had in the lot. It was at that time, or shortly after, that Darrell gave his father the note. He further testified that if Darrell had paid him, he would have let Darrell have the property, and that the deed was more or less a security measure. He further testified that he was never indebted to Darrell from 1948 up to the time of Darrell's death.

Adella Koehn, by deposition which was read in evidence by the plaintiffs, testified that on July 16, 1951, Darrell and Bonnie gave her a deed to Lot 2, Block 1, Paine's Addition to Sidney; that she had a conversation with Darrell, but not with Bonnie; that Darrell talked to Bonnie about the matter; and that the day they went to the attorney's office Bonnie was with them and made no objection in her presence to signing the deed. She further testified that she received no money from Darrell nor from the loan company; that she signed a note regarding the loan with the loan company, and Darrell took care of the money; and that the $3,000 note made out by Darrell was made out to both her and her husband.

Adella Koehn, the mother of the deceased, testified in her own behalf that she was the payee in the note given by her son; that she had received no payment on the note; and that in July 1951, a deed was executed and delivered giving her title as a joint tenant. This deed is in evidence and is the deed from Darrell and Bonnie to Darrell and Adella Koehn describing the premises involved in this action. She further testified that she never had any discussion with Bonnie in connection

with this transaction; that there was no agreement that if any indebtedness existed and was paid she would deed the property back; that since Darrell's death the rentals of the property have been paid to the loan company; and that she had been taking care of the property, seeing that it was rented, and maintaining the necessary repairs. She testified with reference to the repairs and the amounts expended therefor, and the accounting made with the loan company with reference thereto; and that Darrell lived with his parents at the time of his death.

On cross-examination she was requested by plaintiffs' counsel and by the court to produce the $3,000 note. The note was not produced. She further testified that it was a claim against Darrell's estate; that she owns the property here involved which she received by virtue of the deed for which she paid nothing; and that the day she and Darrell went to the attorney's office, Bonnie was in the car, but that she had no conversation with Bonnie.

The defendants contend that the trial court, over appropriate objections, erroneously permitted witnesses for the plaintiffs, having a direct legal interest in the result of the action, to testify with regard to certain transactions and conversations with deceased during his lifetime in violation of section 25-1202, R. R. S. 1943.

This is an equity case, and the cause is here for trial de novo.

Actions in equity, on appeal to this court, are triable de novo, subject, however, to the condition that when the evidence of material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. See O'Brien v. Fricke, 148 Neb. 369, 27 N. W. 2d 403.

Section 25-1202, R. R. S. 1943, provides: "No person

having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation."

In construing section 25-1202, R. R. S. 1943, it was held in Mills v. Mills, 130 Neb. 881, 266 N. W. 759: "The testimony of a witness as to a transaction or conversation had by him with a person since deceased is inadmissible in any civil action or proceeding in the result of which such witness has a direct legal interest, when the adverse party thereto is the representative of such deceased person, unless and until the evidence of such deceased party, in regard to such transaction or conversation, shall have been taken and read in evidence by such representative, or unless the latter shall have first introduced a witness who shall have testified to such transaction or conversation." See, also, Rose v. Kahler, 151 Neb. 532, 38 N. W. 2d 391.

The principal part of the testimony of Bonnie Belle Koehn objected to by the defendants as being in violation of section 25-1202, R. R. S. 1943, is in substance as follows: That on July 16, 1951, this witness, Darrell, and his mother were en route to an attorney's office for the purpose of having Bonnie and Darrell execute a deed conveying the real estate in question in survivorship to Darrell and his mother; and that while in the car Bonnie asked Darrell's mother why the deed was

being taken in her name, and it was explained to Bonnie that it was to make sure the $3,000 debt would be repaid to Darrell's parents, and when that was done the property would be reconveyed to Bonnie in her name, to which her husband agreed. Subsequent to this conversation, Bonnie went to the attorney's office and executed the deed.

The rule with regard to the admissibility of evidence in an equity case tried to the court is that the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was admitted, when there is material, competent, and relevant evidence admitted sufficient to sustain a judgment of the trial court. See Rose v. Kahler, *supra*.

Referring to the testimony of the mother of the deceased given in her own behalf, she testified that she owned the property by virtue of the deed executed and delivered to her; in addition, she had not been paid any amount on the $3,000 promissory note made by her son Darrell. This testimony, for the most part received without objection, related to the vital issues here involved.

In the light of the foregoing authorities and in considering the evidence, we conclude that the trial court did not err, as contended for by the defendants.

With reference to whether the deed here involved is a deed absolute or a mortgage, we deem the following to be applicable to a determination of this question.

Section 76-251, R. R. S. 1943, provides: "Every deed conveying real estate, which, by any other instrument in writing, shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage. The person for whose benefit such deed shall be made shall not derive any advantage from the recording thereof, unless every writing operating as a

defeasance, or explaining its effect as a mortgage, or conditional deed, is also recorded therewith and at the same time."

It is a well-settled principle that a court of equity will consider the purpose and not the form, and that the particular form or words of a conveyance are unimportant if the intention of the parties can be ascertained. See, Ashbrook v. Briner, 137 Neb. 104, 288 N. W. 374; Northwestern State Bank v. Hanks, 122 Neb. 262, 240 N. W. 281.

A deed of real estate, absolute in form, may be shown by parol to have been intended by the parties to it as security for a debt or loan, and as between such parties, at least, the instrument will be construed to be a mortgage. See Morrow v. Jones, 41 Neb. 867, 60 N. W. 369.

If an instrument is intended by the parties to be security for a debt it is in equity, without regard to its form or name, a mortgage. See Campbell v. Ohio National Life Ins. Co., 161 Neb. 653, 74 N. W. 2d 546.

The evidence in the instant case discloses that although the deed in question is absolute in form, it was intended by the parties as security for a debt, and as between such parties it will be construed as a mortgage.

The defendants contend that if the deed is construed as a mortgage, the evidence is insufficient to show payment of the note and they are entitled to a strict foreclosure.

The record discloses that the administrator made demand on the parents of the deceased for an envelope containing valuable papers belonging to the deceased. The administrator did not receive this envelope, so the papers pertinent to this case, if any, could not be produced. The testimony of Bonnie Belle Koehn is to the effect that after deducting the wages shown by the time slips and the $1,000 receipt signed by her husband's mother, which she saw for the last time in March 1954, there remained due on the note between $800 and $900 before the loan was obtained from the building and

loan association. The records of the loan company show that the mother and deceased son received $867.63 from the proceeds of the $6,500 loan; and that over and above all of the expenses of the loan, the materials paid for, and the payment to the mother and Darrell, the deceased received $3,250 in cash. It appears that the defendants made no attempt to exercise dominion over the property until after the son's death. We consider this evidence sufficient to determine that the son's debt to his parents was paid, and so find.

For the reasons given in this opinion, we conclude that the judgment of the trial court should be, and it is, affirmed.

AFFIRMED.

E. H. POWELL, ADMINISTRATOR OF THE ESTATE OF JENNIE I. STARKEY, DECEASED, APPELLANT, V. THE FARMERS STATE BANK, AURORA, NEBRASKA, A CORPORATION, APPELLEE.
82 N. W. 2d 260

Filed April 5, 1957. No. 34109.

1. **Trial: Appeal and Error.** The admissions, stipulations, and agreements of the parties, when finally determined and included in a pre-trial report and order rendered, certified, and filed by the trial court after a pre-trial hearing without objections appropriately taken thereto, are judicial admissions which need not be offered in evidence in order to be considered by the trial court or included in a bill of exceptions in order to be considered by this court upon appeal.
2. **Banks and Banking: Limitations of Actions.** A certificate of deposit made payable on the return of the certificate properly endorsed with no other stipulation fixing a specified or determinable future time after date for payment thereof is a demand certificate and the statute of limitations does not begin to run thereon until demand for payment is made.
3. ———: ———. On the other hand, a certificate of deposit made payable on the return of the certificate properly endorsed at a specified or determinable future time after date is a time certificate and the statute of limitations begins to run thereon

at the expiration of such time without the necessity of any demand for payment.

APPEAL from the district court for Hamilton County: ERNEST G. KROGER, JUDGE. *Affirmed.*

Edgerton & Powell, for appellant.

Charles F. Adams, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiff, E. H. Powell, as administrator of the estate of Jennie I. Starkey, deceased, brought this action against defendant, The Farmers State Bank, Aurora, Nebraska, a corporation, seeking to recover $700, the principal amount of an allegedly unpaid certificate of deposit issued to George Starkey by defendant on December 5, 1919, together with interest thereon at four percent for 1 year from the date thereof. A copy of the certificate was attached to and made a part of plaintiff's petition. Insofar as important here, it read: "* * * payable to the order of himself on the return of this Certificate properly endorsed. 6 or 12 months after date with interest at the rate of 4 percent per annum for the time specified only."

For answer, insofar as important here, defendant denied generally and alleged that plaintiff's alleged cause of action was barred by the statute of limitations. Plaintiff's reply was a general denial. There was a subsequent amendment thereto, but its allegations are not important here.

Motion of defendant for pre-trial hearing was sustained and such a hearing was duly held. Thereafter the trial court rendered, certified, and filed its pre-trial conference report and order without any objections thereto. If first recited at length the nature of plaintiff's theory of recovery and defendant's theory of defense. It then recited that the parties had stipulated

and agreed that certain facts hereinafter recited were true. It was also stipulated that jury trial was waived, and pursuant thereto the cause was tried to the court. Thereafter, in consideration of the pleadings, the stipulations in the report of the pre-trial conference, and evidence adduced, judgment was rendered finding generally in favor of defendant and against plaintiff. It found, insofar as important here, that the certificate of deposit as set forth in plaintiff's petition matured not later than one year after the issuance thereof, on December 5, 1919, and that the statute of limitations began to run not later than December 5, 1920, 12 months after issuance of said certificate. It then found and adjudged that plaintiff's cause of action had long since been barred by the statute of limitations, and dismissed plaintiff's action at plaintiff's costs. Thereafter, plaintiff's motion for new trial was overruled, and he appealed, assigning, insofar as important here, that the judgment was contrary to the evidence and law, and that the trial court erred in finding and adjudging that plaintiff's action was barred by the statute of limitations. We conclude that the assignment should not be sustained.

In that connection, there is no bill of exceptions as such, and defendant argued that the only issue presented for determination by this court was the sufficiency of the pleadings to support the judgment. We do not agree. Revised Rules of the Supreme Court of the State of Nebraska, p. 33, entitled: "2. Pre-Trial Procedure: Formulating Issues," provide in part: "(a) In any civil action in the district court after issues have been joined the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider (1) The simplification of issues; * * * (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof; * * * (6) Such other matters as may aid in the disposition of the action.

"The court shall at the time of the pre-trial hearing

make a record of the proceedings which recites the action taken at the conference, the amendments allowed to the pleadings, and the amendments made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; that counsel shall forthwith acknowledge their assent thereto, or, in the alternative, state into the record any and all objections they may have thereto; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

As we construe such rule, the admissions, stipulations, and agreements of the parties, when finally determined and included in a pre-trial report and order rendered, certified, and filed by the trial court after a pre-trial hearing without objections appropriately taken thereto, are judicial admissions which need not be offered in evidence in order to be considered by the trial court or included in a bill of exceptions in order to be considered by this court upon appeal.

Therefore, in the light of the pleadings, the pre-trial conference report and order, and authorities hereinafter cited, we dispose of plaintiff's assignment, bearing in mind that: "Findings of a court in a law action in which a jury is waived have the effect of the verdict of a jury, and judgment thereon will not be disturbed unless clearly wrong." Barnes v. Davitt, 160 Neb. 595, 71 N. W. 2d 107.

The pre-trial conference report and order thereon, as made by the trial court, recited substantially the following stipulated and agreed facts: That E. H. Powell was the duly appointed and acting administrator of the estate of Jennie I. Starkey, deceased, and defendant is a banking corporation organized and existing under the laws of the State of Nebraska, with its principal place of business at Aurora, Nebraska; that Jennie I. Starkey was sole beneficiary of the estate of George Starkey, deceased, and the certificate of deposit in question, if

valid and collectible, would have been part of his estate and would have been part of the assets of the estate of Jennie I. Starkey, deceased; and that demand for payment of such certificate was made by plaintiff administrator on December 24, 1954, which payment was refused. In that connection, it will be noted that George Starkey died May 19, 1923, and such demand was first made more than 35 years after issuance of the certificate on December 5, 1919, and more than 34 years after December 5, 1920.

It was also agreed that in 1933 defendant was closed and not permitted to reopen until a waiver had been obtained from 85 percent of the depositors in such bank, and that later, at request of the Department of Banking, additional capital was demanded and supplied by assessment on the outstanding stock; that as a part of that transaction a portion of defendant's assets were transferred to a depositors' committee; that the remaining assets were retained in defendant, and the depositors as of March 4, 1933, were paid 50 percent of their deposits by defendant; that on March 4, 1933, defendant was taken over by the Department of Banking, and on March 14, 1933, defendant was permitted to reopen for business as a restricted and limited banking institution, but was not permitted to release any of the deposits made therein prior to March 4, 1933; that on the latter date George Starkey and Jennie I. Starkey, also known as Mrs. George Starkey, had on deposit in defendant, under the name of "Mr. and Mrs. George Starkey," a savings account in the principal sum of $4,177.18, which, together with accrued interest, totalled $4,258.52; that defendant continued to remain in the custody of the Department of Banking and do a restricted and limited banking business by and with consent of such department until February 24, 1934, when defendant made available to Jennie I. Starkey 50 percent of the aforesaid $4,258.52, or $2,129.26, which was subsequently withdrawn from defendant by her over the succeeding

years. There is no stipulation or contention that the certificate of deposit involved herein was presented or included in such amounts.

It was also agreed that on or about June 14, 1933, the trustee of the depositors' committee issued participation certificate No. 494 to "Mr. and Mrs. George Starkey" in the amount of $2,129.26, delivered same to Jennie I. Starkey, and subsequently thereto said trustee paid to Jennie I. Starkey and she respectively received dividends upon such participation certificate in 1934, 1935, 1936, 1938, and 1943, which totalled $1,068.88. That such last dividend was so received on February 13, 1943, after which Jennie I. Starkey surrendered the participation certificate to defendant's trustee. Further, it was agreed that Jennie I. Starkey had actual, bona fide, and continuous residence in Aurora from December 5, 1919, the date of the certificate of deposit involved, until her death on May 13, 1954; that she was a customer of defendant bank prior to March 4, 1933, and continued to be such until her death, during which time she left valuable papers in the custody of defendant and continued her banking business in person on defendant's premises. There is no evidence that she was incompetent at any time during such period.

As we view it, a determination of the issues depends upon whether the certificate of deposit in question was a demand or time certificate. We decide that it was the latter, and that the statute of limitations has barred plaintiff's right of recovery.

As hereinafter observed, the certificate of deposit involved was a negotiable instrument. In that connection, section 62-107, R. R. S. 1943, provides in part: "An instrument is payable on demand (1) where it is expressed to be payable on demand or at sight or on presentation; (2) in which no time for payment is expressed." On the other hand, section 62-104, R. R. S. 1943, provides in part: "An instrument is payable at a determinable future time within the meaning of this

act which is expressed to be payable (1) at a fixed period after date or sight, or (2) on or before a fixed date or future time specified therein, * * *." In that connection, long before as well as after the adoption of such sections, this court has so defined and classified certificates of deposit as either demand or time certificates dependent upon the reasonable construction and effect of all and every part of the related provisions contained therein.

In First Nat. Bank of Rapid City v. Security Nat. Bank, 34 Neb. 71, 51 N. W. 305, 33 Am. S. R. 618, 15 L. R. A. 386, the certificate respectively dated October 8, 1887, read in part: "* * * payable to the order of himself on the return of this certificate properly endorsed. * * * This certificate payable 3 months after date with 6 per cent interest per annum for the time specified." In that case, this court said: "Counsel for the defendant in error insist that the certificates are only payable upon their return and presentation to the maker, properly indorsed * * *. This contention is based upon the phrase, 'on the return of this certificate properly indorsed,' used in the printed form of the certificates. If they contained no other stipulation as to time of payment, there would be ground for debate that they did not become due until payment was demanded, * * *. Authorities are to be found which sustain such a doctrine, but the decisions are not all one way. * * * By their terms they are payable three months after their date. Clearly that is the meaning of the words stamped across the face of the instruments. They are capable of no other reasonable construction. The holder could not have lawfully demanded payment before the expiration of the three months, and had suit been instituted before such time had elapsed, it would have been prematurely brought. The words 'on the return of this certificate properly indorsed,' when read in connection with the other stipulations, do not control the time of payment, nor was it indispensable to a recovery that the

certificates should have been previously presented to the maker duly indorsed. To hold that the tender of a certificate properly indorsed is a condition precedent to maintain an action thereon would defeat a recovery upon a lost certificate, and would prevent a third person from becoming the owner of a certificate payable to the order of the payee, unless indorsed. Such a rule would be unsound in principle and contrary to the weight of the decisions. (Cassidy v. First Nat. Bank, 30 Minn. 86; Citizens Natl. Bank v. Brown, 11 N. E. Rep. (Ohio), 799.)

"Construing together all the conditions of the instruments in suit, and giving effect to every part, as we must, they are payable three months after their date, to the payee, or to the person by him transferred. (Brett v. Ming, 1 Fla. 447; Hunt v. Divine, 37 Ill., 137.)

"In the case last cited the certificate was in the following form: 'BANKING HOUSE OF E. T. HUNT & CO., SYCAMORE, ILL., March 9, 1861. C. M. Chase, Esq., has deposited in this bank two hundred and eighty dollars and fifty cents in currency, subject to the order of himself, and payable in like funds on return of this certificate three months after date. E. T. HUNT & CO.'

"It was held that it was payable absolutely three months after its date, and that a return of the certificate was not a condition precedent to the recovery. The similarity of the certificate in the Illinois case to the ones we are considering, entitled that decision to great weight as a precedent here."

In Kirkwood v. First Nat. Bank of Hastings, 40 Neb. 484, 58 N. W. 1016, 42 Am. S. R. 683, 24 L. R. A. 444, the certificate dated December 4, 1890, read in part: "* * * payable to the order of self, * * * on return of this certificate properly indorsed. * * * With interest at six per cent if left six months; no interest after six months." In that opinion this court said: "It has, indeed, been frequently said that the stipulation for the return of the certificate adds nothing to the instrument.

It is merely the expression of a rule which applies to all negotiable paper, and an action may be maintained without a previous presentment. This question was thoroughly considered in the case last cited. As to the requirement that it should be properly indorsed, it would seem that an indorsement by the payee would not be necessary. A 'proper' indorsement is such an indorsement as the law merchant requires in order to authorize a payment to the holder. If presented by the original payee, no indorsement would be proper or at least necessary; if presented by another, 'proper indorsement' to show his title would be requisite. We do not think that this provision operates as a condition destroying the negotiability of the instrument. * * * In First Nat. Bank v. Security Nat. Bank, supra, an instrument payable upon the return of the certificate properly indorsed, but bearing across its face the language, 'This certificate payable three months after date with six per cent interest per annum for the time specified,' was held to be payable three months after date. There the language was absolute and the construction given was undoubtedly correct. We should here follow the rule adopted in that case and so construe the certificate as to give effect to every part. It would seem that the result would be to reach an analogy to instruments payable 'on or before' a certain date, which are due at the expiration of the time so fixed and not before. (Mattison v. Marks, 31 Mich., 421; Daniel, Negotiable Instruments, sec. 43.)"

In Jacoby v. Dvorak, 111 Neb. 683, 197 N. W. 428, so far as same can be ascertained from oral testimony appearing in the opinion, the certificates involved were respectively dated May 3, 1915, payable 12 months from date on return of the certificates properly indorsed. In that opinion this court said: "A material question necessary to be considered is when, if at all, the certificates in question matured so as to start the statute of limitations. There is considerable difference of opinion in the

decisions as to whether a certificate substantially in the language of those under consideration matures so as to start the statute until a demand of payment has been made. Negative of this proposition has been held in Pennsylvania, Gardner's Estate, 228 Pa. St. 282; Brown v. McElroy, 52 Ind. 404. And it is quite generally held that the statute will not begin to run until after demand in those cases where the certificate does not fix any definite time of payment; * * *. Also, where the certificate is payable upon is return properly indorsed, no time being stated, it is held to be the same as a general deposit, against which the statute will not run until demand. Elliott v. Capital City State Bank, 128 Ia. 275. See, also, Sharp v. Citizens Bank, 70 Neb. 758. But in Thompson v. Farmers State Bank, 159 Ia. 662, it was held that a certificate payable 'six months after date' matured at that time and the statute then began to run." After citing with approval First Nat. Bank v. Security Nat. Bank, *supra,* and Kirkwood v. First Nat. Bank, *supra,* this court went on to say: "Without pursuing the discussion further, we think it results from these decisions that the law of this state must be declared to be that where a certificate of deposit is payable at a certain date say three, six, or twelve months, it matures at the expiration of the time stated and the cause of action accrues at maturity. It follows that the statute of limitations commences when the cause of action accrues."

In Diss v. State Bank, 141 Neb. 146, 3 N. W. 2d 89, the certificate involved was dated December 22, 1923, but was not presented until December 2, 1939, and we concluded that action thereon was barred by the statute of limitations. The certificate provided in part: "'* * * payable to the order of self * * * on the return of this Certificate properly indorsed with interest at 4 per cent. per annum if left 6 months. * * * No interest after maturity.'" In that opinion this court said: "Obviously, it was a time deposit wherein the bank agreed to pay

interest on the amount left for a period of six months. The plaintiff contends that the certificate must be returned properly indorsed, and that it had not been, in which event the certificate remained, with the interest in full force and effect. With this contention we cannot agree. The specific language of the certificate of deposit is plain. It matured more than 15 years prior to the time it was presented for payment by the administrator of the estate." See, also, Towle v. Starz, 67 Minn. 370, 69 N. W. 1098, 36 L. R. A. 463.

In Thompson v. Farmers State Bank, 159 Iowa 662, 140 N. W. 877, 44 L. R. A. N. S. 550, cited with approval in Jacoby v. Dvorak, *supra,* the certificate dated October 28, 1896, was presented for payment on October 11, 1909, and payment was refused. It provided in part: "'* * * payable to the order of same * * * on the return of this certificate properly indorsed, six months after date, with interest at six per cent per annum.'" That opinion quoted with approval from First Nat. Bank v. Security Nat. Bank, *supra,* and Kirkwood v. First Nat. Bank of Hastings, *supra.* Citing other authorities, the opinion went on to say: "There is no escape from the conclusion that, as the certificate was payable at a time specified, the right of action then accrued and as the statute of limitations then began to run more than ten years had elapsed when this action was commenced, and the action was barred as the court rightly determined."

In Barsness v. Burkee, 176 Minn. 355, 223 N. W. 298, the certificates, respectively dated October 26, 1925, and December 3, 1925, read in part: "* * * payable to the order of self * * * on the return of this certificate properly endorsed 6 or 12 months after date, with interest at 4 per cent per annum. No interest after maturity." Payment of neither certificate was demanded within 6 months after issuance. On June 21, 1926, payment was demanded and refused. Demurrer to plaintiff's petition was sustained by the trial court, and upon appeal such order was af-

firmed, saying: "The theory of the action requires a construction of the term used in each certificate, '6 or 12 months after date.' The language in our view permits of but one construction. The certificate holder was entitled to payment of the one certificate at the end of 6 months if he chose to have it. Unless he did, the certificate was a 12 months' certificate, and he was not entitled to pay until the expiration of that period. The cases are few and not all direct. Our construction finds support in Citizens Bank v. Jones, 121 Cal. 30, 53 P. 354; Songer v. Peterson, 114 Kan. 900, 220 P. 1060; Merchants Res. State Bank v. Peterson, 117 Kan. 186, 230 P. 1056.

"The plaintiff claims that the custom of banks in the vicinity * * * was to pay certificates of deposit when presented, though before maturity. The language of the certificate is clear, and the contract made by the certificate is definite. We judicially know that banks often, and to a considerable extent, pay certificates of deposit before due, sometimes paying interest which has accrued and sometimes not paying it; but no custom avoids the explicit contract made by the certificate. If it did, a time certificate would be a demand certificate."

In 9 C. J. S., Banks and Banking, § 316d, p. 644, citing authorities, it is said: "Certificates of deposit are ordinarily payable at the bank of issuance, and are payable at the time expressly or impliedly stipulated by the parties. * * * The time of payment of a certificate of deposit will depend on the contract between the parties. It may be payable at a fixed day or at a fixed time after date, but such instruments are usually payable on demand and are so payable when no time is expressed. * * * A certificate expressly made payable at the expiration of one 'or' another of two stated periods is payable at the expiration of the shorter period if the depositor so elects." See, also, 7 Am. Jur., Banks, § 491, p. 351, citing, among other authorities, First Nat. Bank v.

Security Nat. Bank, *supra,* and Kirkwood v. First Nat. Bank, *supra,* from this jurisdiction.

As stated in Annotation, 23 A. L. R. 12, citing cases from Georgia, New Mexico, and Pennsylvania: "Some certificates of deposit contain a provision that the certificate is payable to the order of the depositor a stated time after date, on return of the certificate properly indorsed. It is the view of some courts that such a certificate is not due absolutely on the expiration of the time stated, but only on return of the certificate and demand for payment; consequently, that the Statute of Limitations does not begin to run until such demand."

On the other hand, as stated in Annotation, 23 A. L. R. 14, citing cases from Iowa, New York, Texas, and Illinois: "On the contrary, other cases hold that the statute runs from the expiration of the date specified." We have adhered to the latter rule, citing authorities from Iowa and Illinois.

In dealing with the statute of limitations, we have held, citing Citizens Bank of Humphrey v. Fromholz, 64 Neb. 284, 89 N. W. 775, that: "As between a bank and its customers, either on a check and deposit account or as holders of demand certificates, there is no promise to pay until demand is made, and consequently a demand is necessary to put the statute in operation." Sharp v. Citizens Bank of Stanton, 70 Neb. 758, 98 N. W. 50.

On the contrary, we have held, as observed in authorities heretofore cited, that where a certificate of deposit provides that it is payable at a specified or determinable future time after date, the statute of limitations runs from the expiration of such time without the necessity of any demand for payment. The latter rule seems entirely logical. To hold otherwise would require us to overrule authorities from this state heretofore cited, give the specified or determinable future time for payment after date provided in the certificate no force or effect whatever, and permit the payee or timely endorsee to trifle with simple contractual language forever and a

day, without any limitation of the right as well as of the remedy.

As we view it, the certificate of deposit involved in the case at bar was a time certificate, and the statute of limitations began to run against liability thereon when it was eventually due and payable on December 5, 1920, 12 months from its issuance on December 5, 1919. No demand for payment having been made until more than 34 years thereafter, we conclude that the statute of limitations had long since barred plaintiff's right of recovery. In that situation, it would serve no purpose to discuss other questions presented in briefs of counsel.

For reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed. All costs are taxed to plaintiff.

AFFIRMED.

WENKE, J., dissenting.

I dissent from the holding of the majority of the court that the "Certificate of Deposit" No. 4624, issued by The Farmers State Bank, Aurora, Nebraska, on December 5, 1919, is barred by the statute of limitations.

The certificate is as follows:

"THE FARMERS STATE BANK $ 700.00
AURORA, NEBRASKA, 12/5/1919 No. 4624
George Starkey has deposited in this Bank
seven Hundred Dollars only only only Dollars,
payable to the order of himself
on the return of this Certificate properly endorsed.
6 or 12 months after date with interest at the rate of
4 percent per annum *for the time specified only.*
George Wanek Cashier.
CERTIFICATE OF DEPOSIT
Not Subject to Check."
(Emphasis is mine.)

This court has held in Citizens' Bank of Humphrey v. Fromholz, 64 Neb. 284, 89 N. W. 775, that: "* * * as between a depositor and a bank, the statute of limitation

does not begin to run until a demand is made for the money on deposit." And the same is true as to a demand certificate. Sharp v. Citizens Bank of Stanton, 70 Neb. 758, 98 N. W. 50. As stated in Sharp v. Citizens Bank of Stanton, *supra*: "As between a bank and its customers, either on a check and deposit account or as holders of demand certificates, there is no promise to pay until demand is made, and consequently a demand is necessary to put the statute in operation." Consequently, if the deposit here involved falls into either of these classes the statute of limitations would not have started to run until demand for payment was made on December 24, 1954. On the other hand, if the certificate of deposit matured at the end of either 6 or 12 months from the date of its issuance, as the majority holds it did, then the statute of limitations would apply. Jacoby v. Dvorak, 111 Neb. 683, 197 N. W. 428. As stated therein: "A bank certificate of deposit payable 12 months after date upon return of the certificate properly indorsed matures at the expiration of the 12 months, and the cause of action thereon then accrues so as to start the statute of limitations."

The time fixed for the payment of a certificate of deposit must necessarily depend upon the terms thereof but is payable on demand unless a time for payment is expressly provided for therein. See Section 62-107, R. R. S. 1943. As therein provided: "An instrument is payable on demand (1) where it is expressed to be payable on demand or at sight or on presentation; (2) in which no time for payment is expressed."

If any doubt exists as to the meaning of the language used in the certificate such doubt should be resolved in favor of the appellant as it was prepared by the appellee and appellant had no part in selecting the language used therein. People's State Bank v. Smith, 120 Neb. 29, 231 N. W. 141; Flory v. Supreme Tribe of Ben Hur, 98 Neb. 160, 152 N. W. 295. This principle is particularly applicable since appellee is authorized to deal with the

general public and accept the deposit of their funds, a public service.

To me the certificate expressly provides that it is payable on demand to George Starkey, or his successors, upon return of the certificate to the bank properly endorsed subject, however, to the condition that the bank is not obligated to pay interest at 4 percent in excess of 12 months no matter how long the money may be left with it. See language of the certificate that I have emphasized. If this construction is correct then appellant's cause of action did not arise until December 24, 1954, when demand was made upon the bank and it refused to pay.

With the possible exception of Kirkwood v. First Nat. Bank of Hastings, 40 Neb. 484, 58 N. W. 1016, 42 Am. S. R. 683, 24 L. R. A. 444, I do not think the cases of this court, cited in the majority opinion, support the conclusion therein reached for the terms thereof are not the same as that of the certificate here involved. In First Nat. Bank of Rapid City v. Security Nat. Bank, 34 Neb. 71, 51 N. W. 305, 33 Am. S. R. 618, 15 L. R. A. 386, the certificates expressly provided: " 'This certificate payable 3 months after date with 6 per cent interest per annum for the time specified' "; in Jacoby v. Dvorak, *supra,* the certificate was "payable 12 months after date"; and in Diss v. State Bank, 141 Neb. 146, 3 N. W. 2d 89, the certificate issued contained the following language: "* * * with interest at 4 per cent per annum if left 6 months. Nov. 30, 1923. No interest after maturity." By their express terms the certificates involved in those cases were payable at a certain date or length of time after the date of their issuance. That, to me, is the meaning of the quoted language from each of those cases but such is not the situation here for no comparable language is contained in the certificate issued by appellee to George Starkey.

This dissent does not mean the author thereof would necessarily arrive at a different conclusion that that

reached by the majority, for appellee has raised the defenses of presumption of payment, laches, and estoppel. Whether or not any or all of those defenses are maintainable I do not decide. I only disagree with the majority in their construction of the language used in the certificate of deposit which was issued by appellee to George Starkey on December 5, 1919.

BOSLAUGH, J., joins in this dissent.

WILLIAM R. PATRICK ET AL., APPELLANTS, V. CITY OF BELLEVUE, APPELLEE.
82 N. W. 2d 274

Filed April 5, 1957. No. 34119.

1. **Municipal Corporations.** A city, in establishing and maintaining a free dump where the residents of the city are privileged to dispose of garbage, waste materials, and miscellaneous debris, performs a governmental function.
2. **Constitutional Law: Municipal Corporations.** Temporary damage to land of an individual caused by the establishment and maintenance of a public improvement by a city for a public use is such a damage as is required to be compensated by Article I, section 21, of the Constitution.
3. ———: ———. If private property is damaged for a public use by a city, the Constitution requires just compensation must be made the owner of the property although the city may have been performing a governmental function and notwithstanding the use was not and did not create a nuisance.
4. ———: ———. The fact that the city is not liable for the negligence of its officers, agents, or employees when the city is engaged in the performance of a governmental function does not exempt it from liability for damage to private property which could have been done under its powers of eminent domain.
5. ———: ———. Private property damaged by a city for a public purpose without an actual taking thereof is required by the constitutional provision to be justly compensated.
6. **Constitutional Law: Pleading.** It is not indispensable that the constitutional provision be set out or its existence alleged in the statement of a cause of action if the litigant otherwise pleads and proves a right of recovery because of it.
7. **Crops: Damages.** The measure of damages to a growing crop

that is destroyed by the wrongful act or omission of another is the value of it at the time of the destruction.

8. ———: ———. Damage based upon the value of an unmatured crop is analagous to profits lost and is governed by the same rule precluding recovery in cases of either uncertainty or remoteness.

9. ———: ———. The question of whether damage based on the destruction of an unmatured crop is speculative is decided by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if it had matured.

APPEAL from the district court for Sarpy County: JOHN M. DIERKS, JUDGE. *Affirmed in part, and in part reversed and remanded.*

William R. Patrick and *Smith & Smith*, for appellants.

John E. Rice and *Dixon G. Adams*, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

The purpose of this action was to enjoin appellee from maintaining and operating its public city dump in such a manner as to cause many different and objectionable kinds of waste materials to be transported to and deposited upon lands of appellants and to recover damages for loss of the use of the land and loss of crops thereon caused by the deposit of the objectionable materials from the dump upon the land. The order of the trial court dismissing certain parties out of this case during the trial became final in that court. The contesting parties on this appeal are appellants and the city of Bellevue, designated appellee.

The following is the substance of the petition of appellants:

Appellants owned the real estate described. Appellee had for 3 years or more used a ravine located on Tax Lot 8-B in Section 35 about one-half mile east of the land of appellants as a public garbage dump in which had been deposited garbage accumulated daily in the

city of Bellevue consisting of many kinds of objectionable materials and miscellaneous insoluble substances. The ravine was part of a natural drainage course for surface waters for a large watershed contiguous thereto which in times of rainfall or melting snow flowed westerly in the drainage course to State Highway No. 75, which is immediately adjacent to the east line of the land of appellants; normally to and through a culvert in the highway; and southerly in the road ditches paralleling the highway. There was on or about June 22, 1949, a rainstorm in the area during which large quantities of waste materials of the character above referred to were carried and transported from the dump in the drainage course to the culvert which was obstructed and closed thereby and because thereof floodwaters and waste materials from the dump were diverted across the highway to and upon the lands of appellants, inundating 15 acres of growing corn thereon and creating a condition which prevented further cultivation of the crop and caused its total loss. The flooding of the land impaired the utility thereof. Within 4 years of the commencement of this case large quantities of material placed in the dump of the kinds herein referred to were carried to and spread upon pasture land of appellants by waters flowing in the drainage course. They have prevented cultivation or the mowing or clearing of the land of willows and noxious weed growths and have destroyed the utility of about 40 acres thereof for any useful or profitable purpose. The proximate result of the acts of appellee has been damage to appellants in the sum of $2,500.

The parts of the foregoing appropriate to the second cause of action of the petition were included therein by reference. It was further stated therein that parts of the land were leased for the year 1949 for a crop share rental of two-fifths of the crops produced. The acts of appellee destroyed the utility of 15 acres of the land and the crop thereon and caused the tenants damage in the

amount of $50 per acre. They expended time and labor in the preparation and planting of the crop and for seed and cultivation thereof before the flooding by the waters which were of the reasonable value of $150. The cause of action of the lessees was assigned to appellants. Appellants ask that appellee be enjoined from maintaining and operating the city dump referred to in the foregoing and sought judgment for damages in the sum of $3,400.

A supplemental petition stated an additional claim of damage. The substance thereof is the following: The appellee has since June 1949 continued to dump large quantities of waste materials in the ravine and on the premises used as the city dump. A heavy rain in that locality on or about May 8, 1950, caused large quantities of waste material from the dump to be washed to and upon the lands of appellants and large quantities of floodwaters to be diverted thereon because of the obstruction of the culvert in the course of drainage with the result that the utility of the lands was destroyed for any useful or gainful purpose and appellants were thereby damaged in the sum of $1,500 for which they also ask judgment.

The district court found that appellants were not entitled to recover damages from appellee because the maintenance by it of a free dump site for the city and its inhabitants was the performance of a governmental function and not a corporate or proprietary function and the city was not liable therefor since no issue of maintenance of a public nuisance was involved. The city at the trial withdrew resistance to granting an injunction because the dump had been discontinued at the location complained of by appellants. The court granted a permanent injunction as appellants prayed and dismissed the case as to the damage claims of appellants. The motion of appellants for a new trial of the issue as to damages was denied. This appeal is from the judgment dismissing the damage claims of

appellants and the denial of their motion for a new trial.

Appellants were at the times important to this case the owners of Tax Lot 9 in Section 35, Township 14 North, Range 13, and 130 acres in the northern part of the northeast quarter of Section 3, Township 13 North, Range 13, known as the McLane place, in Sarpy County. There were about 19 acres in Tax Lot 9 which adjoined State Highway No. 75 on the west and lies north of a railroad overpass. The McLane place lies south of the overpass and Tax Lot 9 and adjoins the state highway on the west. A culvert across the highway is located in the southern part of Tax Lot 9 and immediately east of the McLane place.

Appellee leased Tax Lot 8-B in Section 35, Township 14 North, Range 13, Sarpy County, in November 1948 and established a free land fill public dump area thereon for the inhabitants of the city to deposit their refuse and waste materials. It was about one-fourth of a mile northeast of the culvert in the highway. The drainway extended past the dump to and through the culvert. The only natural drainage in the area from the dump site was to the culvert, across the highway, and south in a ditch along the west side of the highway past the McLane place. This means of drainage of surface waters had been sufficient prior to June 22, 1949, to protect the land of appellants from flooding. The dump was maintained and used from November 1948 until 1951. Appellee built a dike with step-downs on each side for diverting the water around the main dump area and to prevent carriage of debris by drainage waters. There was no complaint made to appellee prior to June 22, 1949, of any materials from the dump having been washed down to, on the highway, or over it and into the land adjoining the highway.

A rainstorm occurred in that area on that date variously described as a 2-to-3 inch rainfall in a couple of hours and not unusual; as 2 inches or better in a couple of hours but causing no flooding elsewhere; as heavier

than usual; and as so heavy that there was not 10-foot visibility for 20 minutes. The dike or dam in the ravine was broken by the force of the water, materials from the dump were washed down the ravine to the culvert, and the passageway of it was closed. The water and debris backed towards the north a distance of some 200 to 400 feet from the culvert, flowed across the highway onto the land of appellants, and was the proximate cause of damage to them.

The issue of damages was resolved against appellants by the trial court on the basis that appellee in maintaining a free dump site for itself and its inhabitants was performing a governmental, as distinguished from a proprietary, function and was not liable to appellants for any damages sustained by them. This is the defense primarily relied upon by appellee. It has not been determined by this court that such an activity by a municipality is a governmental function. There is respectable authority that the furnishing of facilities for the disposal of garbage and other waste materials by a city for the use of its inhabitants is a governmental function.

In Gordon v. Murray City, 106 Utah 582, 151 P. 2d 193, the court said: "A city, in collecting and disposing of garbage, acts for the public health and is discharging a governmental function."

The statement in Bruce v. Kansas City, 128 Kan. 13, 276 P. 284, 63 A. L. R. 325, is as follows: "Be that as it may, and notwithstanding many authorities to the contrary, we find ourselves in good company when we hold squarely, as we feel compelled to do, that in the maintenance of a free municipal dump where the public were privileged to dispose of waste materials and miscellaneous rubbish and in the burning of such rubbish as was combustible the city was exercising a governmental function * * *."

The court in Kuehn v. City of Milwaukee, 92 Wis. 263, 65 N. W. 1030, in speaking of the status of the city in providing a means for the disposal of garbage,

said: "In that respect, it is like the fire, health, or police departments of cities. In such cases, 'the corporation is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law, for the general welfare of the inhabitants or of the community.' "

In 18 McQuillin, Municipal Corporations (3d ed.), § 53.46, p. 267, it is said: "While diversity of judicial views still prevails, late cases generally hold, with some exceptions, that the functions of cleaning of streets, the collection of garbage, and the establishment and maintenance of dumping grounds and incinerators are governmental, rather than proprietary, exercised by the municipality as an administrative agency of the state or for the public in the interest of public health and general welfare * * *." See, also, Annotation, 63 A. L. R. 332.

The acceptance of this doctrine is not decisive of the problem presented by this case. The proof is that appellee provided the dump and maintained it for a public use and that the real estate of appellants was temporarily damaged as a consequence of its existence and use. The hypothesis of appellants is that if a city provides a dump for waste materials, it is for the public and for a public use; that if the city thereby obstructs the natural flow of drainage water which results in damage to the owners of private property by the deposit of debris and floodwaters from the dump, just compensation must be made by the city for the damage; that thereby the private property of the owner is damaged for public use by the city; and that the mandate of the Constitution requires that compensation be made by the city to the owner notwithstanding it was engaged in a governmental function and the use may or may not have been a nuisance.

The fact that the damage suffered by the property

owner was temporary is not important. In Gledhill v. State, 123 Neb. 726, 243 N. W. 909, the state had constructed a temporary bridge across a watercourse on a highway in the place of a steel bridge which had been washed out. Many piles were driven in the watercourse and a sudden thaw caused ice to break up and lodge against the piling resulting in an ice gorge or dam which flooded the water back onto the land of the claimant, causing damages. The action was for the recovery of damages. In deciding the temporary damages were recoverable by virtue of the constitutional provision this court declared: "The fact that the damage in this case was of a temporary nature and caused only by a temporary bridge constructed for the use and convenience of the public does not prevent a recovery. 1 Nichols, Eminent Domain (2d ed.), p. 309, says: 'An entry on private land may constitute a taking, though temporary in its nature and for only a temporary purpose. * * * Accordingly it is held that land or other property cannot be actually put to use by public authority for a temporary purpose without compensating the owner.' * * * In line with this authority and the amendment to our Constitution by the adding of the words 'or damaged,' where one's land is damaged temporarily for public use by the construction of a public improvement by the state, it constitutes such a damage as requires compensation under section 21, art. I of the Constitution." Pierce v. Platte Valley Public Power & Irr. Dist., 143 Neb. 898, 11 N. W. 2d 813, confirms this: "Where one's land is damaged temporarily for public use in the acquiring of an easement by a public corporation for the construction of a transmission line, it constitutes such a damage as requires compensation under section 21, art. I of the Constitution."

The liability for damage of the character described in this case because of the constitutional provision has been considered and discussed in several decisions of this court. Gledhill v. State, *supra,* is one in which this

language appears: "The property of the plaintiff and his assignors was damaged without actual taking by the construction of this temporary public improvement. * * * The bridge constructed was the cause of the damage to the plaintiff and his assignors who owned land upstream from the bridge. The evidence in this case is overwhelming that the beginning of the flood was caused by the floating ice cakes in the ditch being held at the bridge. From this point the ice and water backed up for a considerable distance until the ditch was filled, when it overflowed the land and destroyed the dikes which had been constructed at private expense by the landowners. * * * The bridge was so constructed that it obstructed the flow of ice and water and caused the flood. * * * The finding of the trial court that this temporary highway bridge was the cause of this flood and the consequent damage is the only finding possible from the evidence in this case. Is the damage resulting from the construction of this bridge such as would entitle the plaintiff to just compensation? The property of the plaintiff and his assignors was damaged without actual taking by the construction of a temporary public improvement. Since the insertion of the words 'or damaged' in section 21, art. I of the Constitution of 1875, it has been the well-settled law in this state that one whose property was damaged without actual taking was entitled to just compensation. * * * The constitutional provision embraces the damages which affect the value of a person's property and include such damages as were sustained in the case under consideration. No good reason suggests itself which would prevent the plaintiff recovering the damages sustained in this case." The facts in that case were quite similar to those in the present case. It is persuasive authority that appellants are within the protection of the constitutional provision as to any damage caused them by the acts of appellee complained of herein.

In Scully v. Central Nebraska Public Power & Irr.

Dist., 143 Neb. 184, 9 N. W. 2d 207, this court remarked significantly concerning the Gledhill case in this manner: "It appears from a careful reading of the case that the plaintiff's property rights had been directly invaded by the state through the improper construction of this temporary bridge, by reason of which the plaintiff sustained property damage by the flooding of his land, which was special damage not suffered by the public at large."

Snyder v. Platte Valley Public Power & Irr. Dist., 144 Neb. 308, 13 N. W. 2d 160, 160 A. L. R. 1154, referred to a situation reflected by these facts: Defendant had acquired a right-of-way across land adjoining that of plaintiff on the south and had erected thereon a canal for the transportation of water. South of the right-of-way was a drainage canyon whose outlet to the north crossed the right-of-way and entered onto part of plaintiff's land. Defendant erected a concrete flume from south to north across its right-of-way. Plaintiff claimed that prior to the construction of the flume the water diffused over her land and irrigated it but that afterwards the water entered her land in a narrow channel and damaged it. It is said in the opinion in that case: "One of the incidents of taking property by eminent domain is that not only is the condemnor liable to compensate for the taking but also is liable in this jurisdiction, by virtue of section 21, art. I of the Constitution of the state, for consequential damage to other property in excess of the damage sustained by the public at large. * * * (Many authorities cited.) In City of Omaha v. Kramer, supra, (25 Neb. 489, 41 N. W. 295, 13 Am. S. R. 504) the following significant statement is found: 'Section 21, article I, of the constitution of this state provides that, "The property of no person shall be taken or damaged for public use without just compensation therefor." The section above taken, except the words "or damaged," was in the constitution of 1867. Under that constitution, * * * if none of his real estate was taken for public use he could recover nothing, although

his property had been greatly damaged by such use. The provision, therefore, is remedial in its nature, and the well known rule that, in the construction of remedial statutes three points are to be considered, viz., the old law, the mischief, and the remedy, and so to construe the act as to suppress the mischief and advance the remedy, is to be applied. 1 Blackstone Com., 87. Applying this rule to the provision in question, and it embraces all damages which affect the value of a person's property, and includes cases like that under consideration.' * * * It therefore follows that although the portion of the right of way on which the flume was constructed is not over and across the lands of plaintiff yet she may have her action against the defendant for damages. * * * The wrong and damage was in violation of the Constitution."

In Schmutte v. State, 147 Neb. 193, 22 N. W. 2d 691, is this language: "Section 21, article I, of the Constitution prohibits the state from damaging property for public use without compensation. * * * The fact that the state is not liable for the negligence of its officers, agents, and employees does not excuse it from liability for the taking or damaging of property which was or could have been done under its powers of eminent domain. * * * One whose property is damaged without actual taking is entitled to just compensation."

It is stated in Gruntorad v. Hughes Bros., Inc., 161 Neb. 358, 73 N. W. 2d 700: "In Austin v. Village of Tonka Bay, 130 Minn. 359, 153 N. W. 738, the court discussed and cited numerous cases and then said: 'The above cases are all against cities; none of them is against a county. But the logic of all of them is to the effect that the municipality which invades the right conferred upon the property owner by the Constitution must respond in damages therefor.'" There are many authorities cited in support of that statement.

In Jacobs v. City of Seattle, 93 Wash. 171, 160 P. 299, L. R. A. 1917B 329, the court declared: "The disposal

of garbage may be a proper governmental function, granted by legislative enactment; but, conceding it to be so, the function must be exercised with due regard to constitutional limitations. Our constitution (art. 1, § 16) explicitly provides that private property shall not be damaged for public use 'without just compensation having been first made, or paid into court for the owner.' The complaint in this case sets forth the injury to the property of appellants arising from the erection, maintenance and operation of respondent's plant for the disposal of garbage on land adjoining that of the appellants * * *. The complaint does not seek to charge negligence of the respondent or its employees in the performance of governmental duties, in which case the municipality might be absolved from liability. The first cause of action is founded on the higher ground of the taking or injury to property without just compensation. The authorities sustain the right of recovery in such cases."

The causes of action for damage presented in this case are within the reach of the constitutional provision that the property of no person shall be taken or damaged for public use without just compensation therefor. The decision of the district court to the contrary may not be sustained.

Appellee complains that the case was brought and presented to the district court on the basis of negligent or wrongful acts by joint defendants and after the close of the trial appellants attempted to change their theory of the case to one that appellee was liable in damages because of the constitutional provision prohibiting damage to private property for public use without just compensation therefor. Appellants did not plead that the city was negligent, that it had created or was maintaining a nuisance, or the constitutional provision above recited. Appellants did plead the establishment and maintenance of the dump, the rainstorm, and the damages claimed to have resulted therefrom. They were not required to make reference to the constitutional pro-

vision in their pleadings to have the benefit of it if the facts proven were sufficient to justify the application of it for their benefit. Gledhill v. State, *supra*; Snyder v. Platte Valley Public Power & Irr. Dist., *supra*.

The record shows that 19 acres of corn were totally destroyed by flooding of the land on June 22, 1949. It was a growing, unmatured crop. There was evidence that the land was very productive and in prior years had generally produced a good crop of 50 to 60 bushels of corn per acre. There is no evidence as to the amount of corn that was produced on adjoining land or land in that vicinity during the year 1949. There was an estimate, based upon doubtful foundation, that the 19 acres would probably have produced 1,000 bushels that year if the growing corn had not been destroyed. The measure of damages to a growing crop that is destroyed by wrongful act or omission of another is the value of it at the time of destruction. Gable v. Pathfinder Irr. Dist., 159 Neb. 778, 68 N. W. 2d 500. Damage based upon the value of an unmatured crop is analagous to profits lost and is governed by the same rule precluding recovery in cases of either uncertainty or remoteness. The question of whether damage based on the destruction of an unmatured crop is speculative is decided by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if it had matured. Gledhill v. State, *supra;* Ricenbaw v. Kraus, 157 Neb. 723, 61 N. W. 2d 350. The proof is not sufficient to permit a determination, with reasonable certainty, of the value of the crop of corn that it is alleged was destroyed. Appellants claim that the utility of a part of what is spoken of as the McLane place was destroyed during a period of 3 years. The quantity of the land affected is not shown with reasonable certainty. It is variously referred to as comprising an area from 20 to 40 acres. There is no competent or sufficient evidence as to the amount of the loss to the owners within any legal measure of damage. A determination of the

issue of damage in this court as it is presented would be conjectural and speculative. The record will not permit a determination of the issue by this court.

The judgment granting a permanent injunction in this cause should be and it is affirmed. The judgment as to all other matters should be and it is reversed and the cause is remanded to the district court for Sarpy County for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

RUSSELL ROMANS, APPELLEE, V. ROY BOWEN, APPELLANT.
82 N. W. 2d 13

Filed April 5, 1957. No. 34134.

1. **New Trial.** A verdict and judgment thereon will be vacated and a new trial granted on an application of a party aggrieved by reason of newly discovered evidence only if the evidence is material and could not with reasonable diligence have been discovered at the time of the trial, which evidence would probably change the result substantially and favorably to the applicant.
2. **Appeal and Error.** Under rule 8 a2(4) of the Revised Rules of the Supreme Court, assignments of error relied upon for reversal and intended to be urged are required to be separately numbered and paragraphed.
3. ———. Ordinarily only errors so separately numbered and paragraphed and which have been discussed will be considered on review by the Supreme Court.
4. ———. The Supreme Court may, at its option, notice plain errors not assigned.

APPEAL from the district court for Burt County: PATRICK W. LYNCH, JUDGE. *Reversed and remanded.*

Ronald K. Samuelson, Ernest Raun, and *Keith Hopewell,* for appellant.

Don S. Farrens, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action at law by Russell Romans, plaintiff and appellee, against Roy Bowen, defendant and appellant, to recover an alleged balance of $1,575.20 due under a settlement of accounts made on March 15, 1954, between the parties growing out of a written agreement covering a joint farming and feeding operation of hogs and cattle on the land of the defendant, which was followed by an oral agreement for a feeding operation of hogs and to some extent the production of crops thereon. The action relates only incidentally to production of crops.

On trial of the case a jury returned a verdict in favor of the plaintiff and against the defendant for $1,400. Judgment was rendered on the verdict. A motion for new trial was filed and in due course overruled. From the order overruling the motion for new trial the defendant has appealed.

The assignments of error set forth as grounds for reversal are (1) that the order overruling defendant's motion for new trial is contrary to law, and (2) that it is not supported by and is contrary to the evidence.

The only point asserted or argued in the briefs however is that the court erred in refusing to grant a new trial on the ground of newly discovered evidence.

As ground for action the plaintiff pleaded that on or about March 26, 1953, the parties entered into an agreement whereby the plaintiff was to feed and care for hogs being prepared for market and that as compensation he was to receive 10 percent of the proceeds of sale, and whereby he was to feed and care for cattle then being prepared for market and that for this he was to receive 25 percent of the net profit; that on or about July 1, 1953, the parties entered into an oral agreement by the terms of which plaintiff was to receive a one-half interest in 26 brood sows belonging to the defendant, and a one-half interest in the 1953 fall and the 1954 spring pigs from the sows; that the plaintiff

would farm certain land of the defendant the crops from which would be shared equally between the parties; and that except for certain items of account including plaintiff's interest in cattle and his interest in pigs sold, all accounts were fully settled from time to time prior to March 15, 1954. The allegations to this extent present the background for the basis upon which the action is predicated.

The true basis for the action as pleaded is as follows: On March 15, 1954, the defendant prepared a statement of account of the unsettled items of the parties as follows:

"a. Due the defendant from the plaintiff the sum of $1,128.14 for feed and vaccinating;

"b. Due the defendant from the plaintiff the sum of $650.00 for brood sows purchased;

"c. Due the defendant from the plaintiff, the sum of $565.00 for a press drill and lister purchased from the defendant;

"d. Due the plaintiff from the defendant the sum of $3888.23 for the plaintiff's share of hogs sold for the parties by the defendant in his name and for plaintiff's share of hogs retained by the defendant;

"e. Due the plaintiff from the defendant the sum of $54.98 for the plaintiff's share of hay on the farm; and

"f. Due the plaintiff from the defendant the sum of $175.13 for the plaintiff's share of oats on the farm."

Plaintiff alleged that on the account as thus stated the defendant, on January 17, 1955, paid $200, thus leaving a balance due and owing in the amount of $1,575.20. The prayer was for judgment in this amount.

To the petition the defendant filed an answer wherein he denied generally the allegations of the petition, except that he admitted that he owed $30.11 being a balance due on the purchase of oats of the value of $175.13 and of hay of the value of $54.98 on which he had paid $200. He offered to confess judgment in the

amount of $30.11. For reply the plaintiff filed a general denial.

The record of the evidence discloses that the existence of the two contracts and the alleged contents thereof are not disputed. Likewise beyond dispute the parties negotiated a settlement of the accounts on March 15, 1954. The evidence of the plaintiff however fails to disclose the prepared statement or any other of like import which he has pleaded as the basis of his cause of action.

The evidence of plaintiff discloses that on March 15, 1954, the parties got together in the home of the defendant for the purpose of settling their accounts; that on that date on information furnished by them, a son of the defendant made a computation of the accounts and on the basis of the computation a settlement was made; that at that time the defendant receipted for payment by plaintiff of three separate items as follows: $1,128.14, $650, and $565; that the same day the plaintiff gave to the defendant a receipt for $4,108.34, being $3,888.23 for hogs, $54.98 for hay, and $175.13 for oats; that by instrument dated March 15, 1954, the following certificate was delivered to defendant: "March 15, 1954 To Whom it May Concern: This is to certify that I, Roy Bowen and Russell Romans, have met on this date and made full settlement on cattle, hogs, oats & hay to this date in full satisfaction to all parties concerned. (Signed) Genevieve Romans." The plaintiff testified that this was signed by his wife. The execution and delivery of these instruments is not brought into question. No memoranda of the computation made by the son or of the data upon which it was based are in evidence.

There is no evidence whatever of any statement made on March 15, 1954, that after the settlement of that date the defendant was indebted to plaintiff in the amount of $3,888.23 or of any other amount. To the contrary according to the documents which the plaintiff has exhibited in evidence no amount was due.

According to plaintiff's testimony after this settlement had been made he became dissatisfied. Whether or not any specific demand for payment was thereafter made upon the defendant has not been made certain. In any event this action was commenced. On the trial no effort was made to prove the existence of the statement which was the alleged basis of the cause of action. Plaintiff attempted to prove as a basis for recovery that he was entitled to receive the amount claimed as payment for corn furnished for the feeding of hogs in excess of the amount furnished by the defendant.

His evidence in this connection related either to matters without the settlement or to a deficiency in the amount embraced in the receipt for $4,108.34. Under neither theory does the evidence support the issues made by the pleadings. No objection however has been made by the defendant to this departure.

The parties, under the oral agreement, were engaged upon an enterprise whereby each was to furnish one-half of the expense of care and feed of pigs and sows and to share equally in the profits. No question of profits is directly involved here. The pertinent question is only one of feed.

It is but a matter of reason and logic to say that the question of whether or not the defendant owed the plaintiff anything for feed depended upon the amount of feed each furnished and the value thereof. The record is devoid of any evidence from which any reasonable conclusion may be arrived at in this respect.

In this respect the plaintiff rested his right of recovery on evidence that he furnished a quantity of corn for the animals fed and that for one-half the value thereof the defendant was indebted to him. The quantity was not made certain. The plaintiff adduced no competent evidence as to value. His testimony in this regard failed to take into consideration any specific contribution of feed to the enterprise by the defendant.

In essence therefore the plaintiff's case at the time he

rested depended upon evidence not of an accounting for feed pursuant to the contract alleged but solely upon proof that he had furnished feed.

At the close of plaintiff's case the defendant failed to move for a directed verdict, which would have afforded the court the opportunity to pass as a matter of law on the question of whether or not the evidence was sufficient to sustain a cause of action. It will be interpolated here that likewise no such motion was made at the close of all the evidence.

The defendant then adduced his evidence. In the view taken it does not become necessary to review this evidence herein, but only to say that the defendant gave no testimony that he was indebted to plaintiff in any amount. By answer he admitted that he owed $30.11. It however becomes necessary to discuss an exhibit which was offered in support of the motion for new trial. It is this exhibit that the defendant says was newly discovered evidence which entitled him to a new trial.

The exhibit is the following: "July 17, 1953. Corn by measure owned by Roy—2221.4 bu. Sold to Russell Romans 1110.7 bu. Settlement to be made on return of hogs according to agreement agreed to between parties hereto. (Signed) Roy Bowen (Signed) Russell Romans." The instrument is dated about 17 days after the oral contract was made.

The defendant by affidavit asserted that this exhibit was discovered after the trial and that the failure to discover and adduce it was not the result of lack of due diligence. He urges that if it had been adduced the result of the trial would have been more favorable to him.

A reasonable basis, on the record made in this case, for the contention that if the exhibit had been adduced the result would have been different is not apparent. The only conceivable purpose it could have had on its face would have been to show that on the date it bore the plaintiff owed the defendant for 1110.7 bushels of corn

for which settlement was to be thereafter made.

Arguendo the defendant says that the exhibit could have had a bearing favorable to him in proof of the matters which were included in the settlement of March 15, 1954. Suffice it to say that the defendant is not claiming anything beyond that which he says he was entitled to at that time. The plaintiff has not contended that it was not so included. It could not therefore have added to any basic contention of the defendant.

The rule applicable is that a verdict and judgment thereon will be vacated and a new trial granted on an application of a party aggrieved by reason of newly discovered evidence only if the evidence is material and could not with reasonable diligence have been discovered at the time of the trial, which evidence would probably change the result substantially and favorably to the applicant. City Savings Bank v. Carlon, 87 Neb. 266, 127 N. W. 161; Erwin v. Watson Bros. Transfer Co., 129 Neb, 64, 260 N. W. 565; Miller v. Olander, 133 Neb. 762, 277 N. W. 72; Hahn v. Doyle, 136 Neb. 469, 286 N. W. 389; In re Guardianship of Carstens, 151 Neb. 425, 37 N. W. 2d 581. The showing of the defendant in the light of the record made and the controlling principles will not permit the granting of a new trial in this case on the ground of newly discovered evidence.

We think however that there should be a reversal of the judgment in this case and that a new trial should be granted. To do this it becomes necessary to respond to the exception contained in rule 8 a2(4) of the Revised Rules of the Supreme Court. This provision is as follows: "Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned."

As pointed out the defendant by assignments of error said that the order overruling the motion for new trial

was contrary to law and to the evidence. The assignments were in no wise discussed in the brief.

The plaintiff's evidence fails to sustain a right of recovery in the amount prayed for in the petition or in the amount awarded by the verdict either on the theory presented by the petition or by the evidence. The plaintiff has failed to furnish evidence from which a result may be calculated and a finding made that the defendant is indebted to him in any definite amount or for that matter in any amount.

To allow this verdict and judgment to stand in the light of the failure of the plaintiff to prove the essentials of a right of recovery would be a patent perversion of established rules of law and, under the evidence, a miscarriage of justice. In this light and in the light of the power granted by the rule of this court which has been referred to it is determined that the judgment should be and it is reversed and the cause is remanded with directions to grant a new trial.

REVERSED AND REMANDED.

RALPH MCCAULEY, APPELLANT, V. DON HARRIS, DOING BUSINESS AS HARRIS SALES COMPANY, APPELLEE.
82 N. W. 2d 30

Filed April 5, 1957. No. 34141.

1. **Workmen's Compensation.** A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.
2. ———. Before compensation can be awarded an employee under our law it is required that he prove, by a preponderance of the evidence, that his injury and disability, if any, were caused by an accident arising out of and in the course of his employment.
3. ———. Such facts must be proved by the claimant by sufficient evidence leading to the direct conclusion, or by a legitimate legal inference therefrom, that such an accidental injury occurred and caused the disability. There must be shown a causal connection between an accident suffered by the claimant and the cause of his disability.

4. ———. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant shall prove his right to compensation within the rules above set out nor does it permit a court to award compensation where the requisite proof is lacking.

5. ———. A compensation award cannot be based on possibilities, probabilities, or speculation and if an inference favorable to the claimant can only be reached on the basis thereof then he cannot recover.

APPEAL from the district court for Box Butte County: EARL L. MEYER, JUDGE. *Reversed and remanded with directions.*

Wade H. Ellis, for appellant.

Stubbs & Metz, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is a workmen's compensation case appealed from the district court for Box Butte County. Ralph McCauley began this action on September 1, 1955, by filing his petition in the Nebraska Workmen's Compensation Court against Don Harris, doing business as Harris Sales Company. On November 10, 1955, a member of that court awarded McCauley $28 a week for 8 weeks on the basis of his having suffered temporary total disability for that length of time from and after May 10, 1955. In addition thereto he was awarded necessary medical care in at least the amount of $59. McCauley thereupon waived his right to rehearing before the full compensation court and appealed directly to the district court for Box Butte County. The district court awarded McCauley the sum of $283 in full satisfaction of all disability and necessary medical expenses, being $28 a week for 8 weeks of temporary total disability and $59 for necessary medical services. McCauley filed a motion

for new trial and, from the overruling thereof, perfected this appeal.

In his petition for rehearing filed in the district court appellant alleges that as a result of a sprained ankle and a resulting coronary condition he was totally disabled from May 10, 1955, for a period of 13 weeks and thereafter partially permanently disabled to the extent of 50 percent. Based thereon he asks for whatever he may be entitled to under the Nebraska Workmen's Compensation Act.

An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record. Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379.

Appellant, 47 years of age, was employed by appellee as a bakery goods routeman in Alliance, Box Butte County, Nebraska. For these services he was being paid at the rate of $70 a week plus certain commissions. About 6:40 a.m. on Monday, May 9, 1955, while on the job, appellant severely sprained his right ankle in the course of his employment. It happened when he jumped from a platform or wooden dock at the rear of appellee's warehouse in Alliance which was being used for the loading of delivery trucks. The dock was between 4½ and 5 feet high and had no stairs, steps, or other means for getting on or off. The injury suffered by appellant resulted when his right foot landed on a round stick which caused it to turn and throw him to the ground.

Appellant continued on the job and made his deliveries. In doing so he had to get in and out of the delivery truck to get the bakery products and in some instances had to go up and down stairs to deliver them to customers. Some of the cartons of bakery goods which he delivered weighed as much as 25 pounds. His sprained ankle began to hurt so between 10:15 and 10:30 a.m. he consulted Dr. John S. Broz, a local doctor, about it. Dr. Broz examined and X-rayed it but found no fractured bones, only sprained ligaments. Appellant went home for lunch at which time his wife put a cold pack

on his swollen ankle. After lunch appellant returned to his job. However, about 3:30 p.m. appellant again went to see Dr. Broz. Dr. Broz then advised appellant to go home, rest, elevate his right foot, and treat the swollen ankle with alternating hot and cold packs. This he did. At this time the ankle was badly swollen and was becoming discolored.

Appellant did not feel good on Tuesday, May 10, 1955, so he stayed home. He spent most of his time that day resting. He did so either in bed or on a davenport, sitting up very little. About noon, or shortly thereafter, he started to have some pain in his chest in the area of his heart. These pains were not severe at first, in fact he was able to sit at the table and eat his evening meal. Shortly after 11:15 p.m. that night, when he attempted to go to the bathroom, appellant was stricken with a severe coronary occlusion. As a result Dr. Broz was called immediately. He arrived about 11:45 p.m., found appellant in a very critical condition, and gave him a hypodermic. Thereafter Dr. Broz called for an ambulance and had appellant removed to St. Joseph's hospital where he remained for some 36 days, the first 10 or more of which were spent under an oxygen tent. On June 15, 1955, he was released from the hospital but remained in his home under a doctor's care.

On August 8, 1955, appellant was permitted to return to work on his former job, although directed to take it easy and slow up. This he did. For over a month he only supervised the job and thereafter he worked regularly but it now takes him about 2 hours longer each day to perform the same duties he formerly did.

"A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment." Feagins v. Carver, *supra.*

Before compensation can be awarded an employee under our law it is required that he prove, by a preponderance of the evidence, that his injury and disabil-

ity, if any, were caused by an accident arising out of and in the course of his employment. Pixa v. Grainger Bros. Co., 143 Neb. 922, 12 N. W. 2d 74; Jones v. Yankee Hill Brick Manuf. Co., 161 Neb. 404, 73 N. W. 2d 394; Feagins v. Carver, *supra*.

As stated in Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51: "Such facts must be proved by the claimant by sufficient evidence leading to the direct conclusion, or by a legitimate legal inference therefrom, that such an accidental injury occurred and caused the disability. There must be shown a causal connection between an accident suffered by the claimant and the cause of his disability." See, also, Gilcrest Lumber Co. v. Rengler, 109 Neb. 246, 190 N. W. 578, 28 A. L. R. 200; Jones v. Yankee Hill Brick Manuf. Co., *supra*.

In this respect, we said in Jones v. Yankee Hill Brick Manuf. Co., *supra*: "The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant shall prove his right to compensation within the rules above set forth nor does it permit a court to award compensation where the requisite proof is lacking." See, also, Feagins v. Carver, *supra*.

The evidence adduced establishes appellant suffered a severe injury to his right ankle as the result of an accident arising out of and in the course of his employment by appellee. The question is, has appellant established a causal connection between the accident resulting in a severely sprained ankle and the coronary occlusion, the latter being the cause of his permanent disability? In this respect the medical testimony is the key factor. A compensation award cannot be based on possibilities, probabilities, or speculation and if an inference favorable to the claimant can only be reached on the basis thereof then he cannot recover. Ruderman v. Forman Bros., 157 Neb. 605, 60 N. W. 2d 658; Murray v. National Gypsum Co., 160 Neb. 463, 70 N. W. 2d 394; Jones v. Yankee

Hill Brick Manuf. Co., *supra*; Feagins v. Carver, *supra*. As stated in Jones v. Yankee Hill Brick Manuf. Co., *supra*: "An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence."

Dr. Friedrich W. Niehaus of Omaha, Nebraska, a specialist in internal medicine and cardiology, completely examined appellant on July 25, 1955, at his office. He found appellant was then suffering with intercostal neuralgia but found that several months before he had had a coronary occlusion. In answer to questions based on appellant's injury and his continuing to work on May 9, 1955, Dr. Niehaus testified it could have caused the coronary occlusion but thought it very highly probable it did not, that is, he could not see how it could have been a precipitating cause. He went on to testify that its happening therefrom would be a very, very remote possibility and did not think there was any connection between the two. His overall view is very well expressed in his report as follows: "It is extremely doubtful, in fact untenable that a sprained ankle would be the precipitating factor in a coronary occlusion. It seems to me the two conditions are coincidental and not related." Dr. Niehaus emphasized the fact that the lapse of time between the injury and the symptoms leading to the coronary occlusion made the ankle injury become less significant.

Dr. Thomas D. Fitzgerald, an associate of Dr. Broz in the Broz Clinic at Alliance, observed appellant in the hospital on and after either May 12 or 13, 1955. He testified it was difficult to say just what causes any coronary; that it was conceivable, if the shock of the pain was sufficient, that that could actually have caused it; that appellant's injury and his continuing to work could have aggravated the original condition; that there is the possibility that that could have caused a weak heart condition several days after the original shock; but that he would think more about it if it had happened at 3

in the afternoon (Monday) rather than 28 hours later.

Dr. Broz testified that he felt the sprain to appellant's ankle definitely precipitated the coronary occluson stating it resulted from the sprained ankle and the extra burden or overload placed on him when he kept on working. However, we think Dr. Broz's evidence is considerably weakened because he was under the mistaken belief that appellant's chest and heart pains had started by 3:30 p.m. on Monday, when, as a matter of fact, they did not start until after noon on Tuesday. This conclusion is based on the significance that both Drs. Niehaus and Fitzgerald placed on the lapse of time as it relates to causal connection.

We have come to the conclusion that it would be very speculative to permit appellant to recover for his condition resulting from the coronary occlusion as the evidence adduced shows that it is only a possibility that it resulted from the accident to appellant's right ankle and his continuing to work thereon for the balance of the day on which he received the injury.

The question then arises, does the evidence adduced support the award rendered by the trial court? There is no question but what appellant is entitled to be paid for the temporary disability he suffered because of the sprained ankle but there is nothing in the evidence adduced to show what that was, nor do we think the record supports any award for necessary medical expense arising from the sprained ankle to the extent of $59. We think the extent of such medical expenses, as shown by the record, is $12.

We reverse the judgment rendered by the district court with directions that the appellant be given an opportunity to adduce evidence to show what length of time the sprained ankle alone would have kept him temporarily off the job and that he be awarded temporary total disability for that length of time in accordance with the Workmen's Compensation Act together with the sum of $12 for medical expenses. In all other re-

spects appellant's claim should be denied. Costs are taxed to appellant.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. CLARENCE S. BECK, ATTORNEY GENERAL, PLAINTIFF, V. CITY OF YORK ET AL., DEFENDANTS.

82 N. W. 2d 269

Filed April 5, 1957. No. 34156.

1. **Constitutional Law.** The prohibition contained in Article XIII, section 3, Constitution of Nebraska, relating to the giving or loaning of credit in aid of any individual, association, or corporation, applies to the State and all political subdivisions thereof.
2. **Municipal Corporations: Taxation.** Municipal revenue bonds are obligations of a city even though they are not general obligations and not subject to payment through the exercise of the taxing power.
3. **Constitutional Law: Municipal Corporations.** Money derived from the sale of municipal revenue bonds is public money.
4. **Constitutional Law.** Public money may not be expended for a private purpose whatever its source may be.
5. **Constitutional Law: Municipal Corporations.** The purchase of land by a municipality and the erection of an industrial plant thereon for lease to a private corporation for private gain and profit, by issuing revenue bonds to be paid solely from rentals, is not for a public purpose.
6. ———: ———. The building and leasing of industrial plants, and their leasing to private concerns for use for private profit or gain, financed by municipal revenue bonds payable solely from rentals, as authorized by sections 18-1601 to 18-1613, R. R. S. 1943, violates Article XIII, section 3, of the Constitution, prohibiting giving or loaning credit in aid of an individual, association, or corporation.

Original Action. *Demurrer overruled.*

Clarence S. Beck, Attorney General, and *Clarence A. H. Meyer,* for plaintiff.

Cline, Williams, Wright & Johnson and *Wallace W. Angle,* for defendants.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an original action brought by the State of Nebraska on the relation of the Attorney General, at the direction of the Governor pursuant to section 84-205 (9), R. R. S. 1943, to enjoin the defendants from proceeding under section 18-1601 to section 18-1613, R. R. S. 1943, because of its constitutional invalidity. The defendants filed a general demurrer to the petition. The sole question before the court is whether or not the petition states a cause of action.

The defendants are the city of York and its mayor and city councilmen. The petition alleges that the city, acting through the members of the city council, entered into an agreement with the York Cold Storage Company and the York Packing Company, that upon the completion of certain industrial buildings to be constructed by the York Cold Storage Company, the city would purchase the same by issuing revenue bonds pursuant to the authority contained in section 18-1601 to section 18-1613, R. R. S. 1943, hereinafter called the Act. The petition also alleges that upon the purchase of the industrial buildings, the city proposes to lease them to the York Packing Company as a packing plant for the slaughtering of hogs.

Plaintiff asserts that the Act is violative of Article XIII, section 3, of the Constitution of this state, which provides: "The credit of the state shall never be given or loaned in aid of any individual, association, or corporation."

It is here contended that the prohibition contained in the foregoing constitutional provision applies only to the State as an entity and has no application to political subdivisons thereof. We do not concur in this view. Political subdivisions of the State exist at the will of the State exercised through the Legislature. For us to

say that the State may not loan its credit to an individual, association, or corporation, but that it might create a political subdivision and authorize it to do that which the State itself is prohibited from doing would be, to say the least, a very anomalous situation. It would permit the State to do by indirection the very thing it could not directly do, a theory which has been consistently condemned by this court. Steinacher v. Swanson, 131 Neb. 439, 268 N. W. 317; Peterson v. Hancock, 155 Neb. 801, 54 N. W. 2d 85. It is clear that the framers of our Constitution had in mind a prohibition against giving or loaning the credit of the State or any subdivision thereof for a purely private purpose. This supports the fundamental principle that public moneys may not be used for private purposes. To impose such a prohibition as a matter of constitutional policy on the State, only to have its beneficent purpose thwarted by a refinement of definition not contemplated by its framers, would be to avoid the very purpose for which it was intended. It is not the function of courts to thus rewrite constitutional provisions to avoid their plain effect. It is the plain intention of this provision that state government, including political subdivisions thereof, shall not extend credit in aid of private persons and private enterprises. It is a prohibition, also, to protect the State and its political subdivisions against reckless financial involvement in private enterprises supposed to serve the public good but which are in fact dominated by private interest. We conclude that the prohibition contained in Article XIII, section 3, Constitution of Nebraska, applies to the State and all political subdivisions thereof.

It is contended, also, that the provision has no application in the present case for the reason that the credit of the city was not given or loaned. It is argued that the revenue bonds were not general obligations of the city and that they would not become a charge against its general credit or taxing powers. It cannot be questioned

that the revenue bonds are payable solely out of revenues derived from the leasing of the project to be financed by the bonds so issued. This court has so limited the liability of a city on this type of bond. Kirby v. Omaha Bridge Commission, 127 Neb. 382, 255 N. W. 776. Is the issuance of revenue bonds in the manner prescribed by the Act an extension of the credit of the city?

It is true that the revenue bonds are not a general liability of the city and they are not subject to payment through the exercise of the taxing power. But they do cast burdens upon the city with reference to their issuance and payment. The city and its officers are charged with the duty of fixing and collecting the rentals from which the revenue bonds are to be paid. This necessitates the execution of leases, the fixing of rentals, the taking of chattel mortgages on equipment to secure the payment of rent, the providing of insurance coverage, and the determination of payments to be made in lieu of taxes. It imposes duties and responsibilities upon the city and its officers on matters which are private rather than public in character. The issuance of the bonds in the name of the city for the payment of the cost of the project evidences the fact that the credit of the city has been extended. The city is the payer of the bonds and it is primarily liable for their payment. The bonds become the obligations of the city. The fact that the means of payment is limited does not make it any less so. A failure of payment is a default by the city. The constitutional prohibition does not infer that the credit of the State or its political subdivisions may be given or loaned except when a general liability exists. The prohibition clearly provides that the credit of the State may not be given or loaned to an individual, association, or corporation under any circumstances. When the State or a political subdivision thereof becomes a payer of a revenue bond or any other evidence of indebtedness which

is to be used in the accomplishment of a private as distinguished from a public purpose, the credit of the State has been given or loaned contrary to Article XIII, section 3, of the Constitution. If evidences of indebtedness by interested private persons are inadequate and revenue bonds of the city are sufficient, either the credit of the city has been extended or their purchasers are victims of a base delusion. It seems clear to us that the revenue bonds are issued by the city in its own name to give them a marketability and value which they would otherwise not possess. If their issuance by the city is an inducement to industry, some benefits must be conferred, or it would be no inducement at all. Such benefits, whatever form they may take, necessarily must be based on the credit of the city. The loan of its name by a city to bring about a benefit to a private project, even though general liability does not exist, is nothing short of a loan of its credit. The use of the city as the payer of the bonds is intended to give respectability to them because of the general acceptability of cities as a source of bond issues in financial markets. It is a loan of the credit of the city within the meaning of the constitutional prohibition.

The defendants cite cases from other states upholding the constitutionality of similar acts. Faulconer v. City of Danville, 313 Ky. 468, 232 S. W. 2d 80; Newberry v. City of Andalusia, 257 Ala. 49, 57 So. 2d 629; Holly v. City of Elizabethton, 193 Tenn. 46, 241 S. W. 2d 1001. These cases are based on what we deem fundamental fallacies of reasoning. The first is that a revenue bond for which a city is not generally liable is not within the prohibition against the State giving or loaning its credit. The second is that the issuance of such revenue bonds for the construction of industrial plants for private users is a valid exercise of the proprietary powers of a municipality. The third is that the issuance of revenue bonds for the construction of industrial buildings for private use is for a public purpose.

We have already discussed the first point and we shall give it no further consideration here. With respect to the second point, we point out that the exercise of proprietary powers is limited by the rule that the subject sought to be included in the exercise of a proprietary power must bear a reasonable relation to the public convenience and welfare. In other words, it must relate to the public good as distinguished from a purpose dominated by private interest. This point is closely related to the question whether the issuance of revenue bonds by a city to construct an industrial plant for the slaughtering and processing of hogs is for a public purpose. We hold that it is not. We think the reasoning of the court involving a similar statute in State v. Town of North Miami (Fla.), 59 So. 2d 779, points the way to the correct conclusion.

In the last-cited case the court said: "This Court has approved special acts of the Legislature authorizing advertising programs, the acquisition of land, for golf courses, parks, playgrounds and recreational and hospital centers. The Court has also approved special acts authorizing the construction of buildings which served a public purpose and many other acts authorizing counties and municipalities to acquire property and make improvements to public property which served a public purpose. In none of the cases decided by this Court since the adoption of our present Constitution have we approved any special legislative acts which authorized any of the political subdivisions or governmental units of the State to acquire property and erect buildings thereon for the exclusive use of a private corporation for private gain and profit.

"Every new business, manufacturing plant, or industrial plant which may be established in a municipality will be of some benefit to the municipality. A new super market, a new department store, a new meat market, a steel mill, a crate manufacturing plant, a pulp mill, or other establishments which could be named

without end, may be of material benefit to the growth, progress, development and prosperity of a municipality. But these considerations do not make the acquisition of land and the erection of buildings, for such purposes, a municipal purpose. * * * Our organic law prohibits the expenditure of public money for a private purpose. It does not matter whether the money is derived by ad valorem taxes, by gift, or otherwise. It is public money and under our organic law public money cannot be appropriated for a private purpose or used for the purpose of acquiring property for the benefit of a private concern. It does not matter what such undertakings may be called or how worthwhile they may appear to be at the passing moment. The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional system. Experience has shown that such encroachments will lead inevitably to the ultimate destruction of the private enterprise system." We deem the foregoing to be most persuasive reasoning and a statement of controlling principle.

We summarize as follows: The constitutional prohibition against the State as to giving or loaning its credit to an individual, association, or corporation is applicable to all subdivisions of the State. The issuance of revenue bonds by a city, although the city is not generally liable for their payment, is an obligation of the city even though the source and method of payment is restricted. The money realized from revenue bonds is public money and it may not be appropriated for a private purpose or used for the purpose of acquiring property for the benefit of a private concern. It is not material what such undertakings may be called, or what forms are devised to conceal their main purpose, or how worthwhile they may appear to be, when the question of constitutionality is presented, their substance will be examined. The financing of private enterprises with public funds is foreign to the funda-

mental concepts of our constitutional system. To permit such encroachments upon the prohibitions of the Constitution would bring about, as experience and history have demonstrated, the ultimate destruction of the private enterprise system. We have not overlooked the fact that the Legislature determined that the Act was for a public purpose. While such a legislative declaration is entitled to great weight, it is not conclusive. There are limits beyond which the Legislature cannot go. It cannot authorize a city to spend public money, or lend or give away, directly or indirectly, its credit or property for a purpose which is not a public one.

The purpose of the statute, and the contract in the present case springing therefrom, is to assist a private corporation that is engaged in an enterprise for profit. It is true, of course, that the city may be benefited by the location of the company in the city. It may produce employment for citizens of the community. It may tend to balance a locally restricted economy. But general benefit to the economy of a community does not justify the use of public funds of the city unless it be for a public as distinguished from a private purpose. This is simply a case where the city is attempting to use the powers, credits, and public moneys of the city to purchase land and erect industrial buildings thereon for the use of a private corporation for private profit and private gain. It serves no public or municipal purpose. The Act purports to grant powers to cities which are beyond the authority of the Legislature to confer.

This court, in Oxnard Beet Sugar Co. v. State, on rehearing, 73 Neb. 66, 105 N. W. 716, dealt with a problem somewhat similar to the one we have before us. The court said: "The legislature cannot appropriate the public moneys of the state to encourage private enterprises. The manufacturing of sugar and chicory is a private enterprise, and the public money or credit

cannot be given or loaned in aid of any individual, association or corporation carrying on such enterprises. Const., art. XII, sec. 3."

To permit legislation of this character to stand in the face of constitutional prohibitions would constitute a death blow to the private enterprise system and reduce the Constitution to a shambles in so far as its protection of private enterprise is concerned. The contract pleaded in the petition is void and the Act upon which it is based is a plain violation of the letter and spirit of Article XIII, section 3, of the Constitution of this state. The demurrer to the petition is therefore overruled.

DEMURRER OVERRULED.

TOM J. CRAWFORD, WHOSE REAL AND TRUE NAME IS THOMAS J. CRAWFORD, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

82 N. W. 2d 1

Filed April 5, 1957. No. 34158.

1. Forgery. To utter and publish a forged instrument is to offer to pass it to another with intent to prejudice, damage, or defraud, declaring or asserting directly or indirectly by words or actions that it is good.
2. ———. In a prosecution for uttering and publishing a forged instrument, knowing it to be forged, a conviction cannot be sustained without proof of the forgery.
3. ———. To sustain a conviction for forgery, it is not sufficient for the State to show that the signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his authority.

ERROR to the district court for Otoe County: JOHN M. DIERKS, JUDGE. *Reversed and remanded with directions.*

Robert L. Morrissey and *Otto H. Wellensiek*, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Gerald S. Vitamvas,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

An information filed in the district court for Otoe County charged in substance that on March 12, 1956, in Otoe County, defendant, Thomas J. Crawford, having in his possession and custody a certain forged bank check, well knowing that it was forged, did knowingly, falsely, and feloniously utter and publish same as true and genuine with intent to prejudice, damage, and defraud. Defendant, while represented by counsel, was tried to a jury upon his plea of not guilty. His motions to dismiss the information and direct a verdict of not guilty, made at conclusion of the State's evidence and again at conclusion of all the evidence on the ground that the State had failed to meet the burden of proof and prove beyond a reasonable doubt the charge alleged in the information, were overruled and the jury found defendant guilty as charged. Defendant's motion for new trial was overruled and sentence was pronounced. Thereafter he timely filed in this court his petition in error and transcript. Insofar as important here, defendant assigned that the trial court erred in overruling his motion to dismiss the information and for directed verdict made at the conclusion of the State's evidence. We sustain the assignment.

We have established that to utter and publish a forged instrument is to offer to pass it to another with intent to prejudice, damage, or defraud, declaring or asserting directly or indirectly by words or actions that it is good. Robeen v. State, 144 Neb. 910, 15 N. W. 2d 69.

We have also well established that in a prosecution for uttering and publishing a forged instrument, knowing it to be forged, a conviction cannot be sustained without proof of the forgery. Further, to sustain a

conviction for forgery it is not sufficient for the State to show that the signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his authority. Berg v. State, 157 Neb. 863, 61 N. W. 2d 837. Such rules are applicable and controlling here.

Evidence adduced by the State was substantially as follows: That on March 12, 1956, about 2:30 or 3 p. m., defendant came into the Otoe County National Bank. A lady teller who had never seen defendant before motioned or requested him to come to the bank teller window where she was employed. Defendant then came over to her window and presented the check involved. Thereupon she "asked him if he wanted cash" and he said "Yes." She did not ask him his name and there was no other conversation by any one with defendant. She then took the check to another teller's window, but he knew nothing about it, so she took it over to another teller's window and asked him if he knew about it. That teller took the check in his hands, looked up, and defendant waved at him. He had been a teller in that bank 5 years, was somewhat familiar with the genuine signature of the drawer of the check involved, having accepted for payment checks written by her several times on previous occasions. His opinion was that the signature of the drawer on the check was not her genuine signature. During and after showing the check to the other two tellers, defendant just remained standing there in the lobby and the lady teller took the check and went back to the bookkeeping department for several moments. When she returned to her window, defendant had left the bank without having been paid any money on the check. She had been a teller and bookkeeper for 7 years in that bank and had been familiar with the genuine signature of the drawer all of that time. Her opinion was that the signature of the drawer on the check was not her genuine signature.

The sheriff of Otoe County testified as a witness for

the State that defendant had been in the county jail from April 2, 1956, and was still there at the time of his trial on September 9 and 10, 1956. The sheriff knew defendant's son, whose name was Eugene Crawford, and who used the initials "E. J." Crawford. The sheriff testified in substance that on May 14, 1956, when he took defendant's lunch up to him in the jail, defendant wanted the sheriff to call his daughter who lived at Plattsmouth and have some money sent down. He also said that he and his son came to Nebraska City and parked east of the bank or east of a drug store around the corner; that his son gave him the check involved and told him to go to the bank and get it cashed; that he did so to help his son who needed the money, and when the girl went to check up on it he left the check there and told a man teller that he had to go and check the meter on his truck. He then went back out to the car and they left Nebraska City. No evidence was adduced by the State that defendant ever wrote any part of the check.

The person whose name appeared upon the check as drawer testified substantially as follows while a witness for the State: That on February 20, 1956, a man named J. E. Crawford came to her home in Nebraska City wanting to inspect her house for termites; that she permitted him to enter the basement for that purpose; and that he reported to her that there were termites and he would treat her house for termites if she would let him do it right away. He did such work and she paid him therefor. She did not see defendant on March 12, 1956, but on that date about 2 p. m., J. E. Crawford returned to her home and wanted her name, so she wrote her name and address on a piece of paper and gave it to him. Calling her attention to exhibit No. 1, the check involved, which had been received in evidence, the witness was asked and answered as follows: "Q * * * Did you give this check to anyone? A No, not that I know of. Q And did you write that check? A No, I did not.

Q And is it your signature? A No, it is not." In that connection, she was not asked and did not testify that her signature was made without authority, and there is no evidence whatever, either direct or circumstantial, in this record affirmatively showing that the signature on the check was made without her authority. Also, the trial court gave no instruction whatever to the jury upon that necessary element.

In the light of rules heretofore set forth, we may assume, without deciding, that the evidence was sufficient if believed that the signature on the check was not that of the drawer, but that is not sufficient in the absence of any affirmative showing that the signing was made without authority. Authorities relied upon by the State are entirely distinguishable upon the facts and law.

We conclude that the trial court should have sustained defendant's motion to dismiss, and directed a verdict for defendant at the conclusion of the State's evidence. Contrary to the State's contention, such conclusion makes it unnecessary for us to consider any evidence adduced in defendant's behalf, or to determine any other assigned errors.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is reversed and the cause is remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

WILLIAM A. TOWNER, APPELLANT, V. WESTERN CONTRACTING CORPORATION ET AL., APPELLEES.
82 N. W. 2d 253

Filed April 5, 1957. No. 34171.

1. **Pleading.** When an answer to a petition consists of a general denial, the defendant may introduce such testimony as will tend to disprove the testimony of the plaintiff in support of his petition. For such purpose no other allegations in the answer are necessary.

2. **Workmen's Compensation.** Where there have been two accidents to an employee, the question of whether the disability sustained by him should be attributable to the first accident or to the second accident depends on whether or not the disability sustained was caused by a recurrence of the original injury or by an independent intervening cause.
3. ———. If the second injury is but a recurrence of the original injury, compensation therefor must be paid by the employer and insurance carrier at the time of the first injury.
4. ———. Where the first accident was not a proximate cause of the second accident, the second accident constitutes an independent intervening cause.
5. ———. In order to recover, the burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.
6. ———. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence.

APPEAL from the district court for Cedar County: ALFRED D. RAUN, JUDGE. *Affirmed.*

Kenneth M. Olds and *Slaughter & Brady,* for appellant.

Frederick M. Deutsch, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is a workmen's compensation case. Plaintiff alleges that he was an employee of the defendants when on August 3, 1954, he suffered an accident to his back resulting in a herniated and ruptured disc; that the injury was not discovered until September 1955; that he underwent an operation in October 1955; and that he suffered temporary total and permanent partial disability therefrom. He seeks compensation, hospital and medical expenses, and attorney's fees under the Workmen's Compensation Act.

The defense, so far as important here, is that the injury and disability resulted from an accident in

the course of plaintiff's employment in September 1955, when plaintiff was the employee of other parties who have a different insurance carrier.

The matter was heard before one judge of the compensation court, resulting in a dismissal of the plaintiff's cause. The matter was appealed to the district court and again resulted in a dismissal of plaintiff's cause. Plaintiff appeals here.

We affirm the judgment of the trial court.

The cause is here for trial de novo on the record. Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51.

Preliminary to a statement of the evidence there are other matters which must be determined. In their answer in the district court, defendants denied generally, pleaded the statute of limitations, pleaded that plaintiff had sustained an accidental injury on September 20, 1955, while no longer an employee of the defendants, and alleged that said second accidental injury was the sole and proximate cause of any disability of plaintiff. Plaintiff moved to strike the allegation in defendants' answer as to the September 1955 injury. The basis of this motion was that it was an affirmative defense which had not been pleaded in the compensation court and was the raising of a new issue.

The trial court sustained the motion. The cause went to trial on the general denial and plea of the statute of limitations.

The court admitted evidence of the second injury based on statements of the plaintiff as admissions against interest.

The trial court held that plaintiff had failed to sustain his burden of proof.

As will appear in the discussion of the evidence, the question of the admissibility and consideration of the evidence of the second injury is important to a determination of the questions presented here.

Plaintiff's contention is that the evidence as to the second injury was erroneously admitted, and should

not have been considered by the trial court and cannot be considered here.

Plaintiff argues here that section 48-176, R. R. S. 1943, requires that the defendant by answer either admit or deny the substantial averments of the petition; that he "shall state the contention of the defendant with reference to the matters in dispute"; and that the quoted language required the defendant to plead the second injury in the compensation court if it was to be relied upon as a defense.

The concluding phrase of the sentence in section 48-176, R. R. S. 1943, is "as disclosed by the petition." Plaintiff quotes the clause. He then quits reading too quickly. Section 48-173, R. R. S. 1943, sets out the contents of a petition for compensation concluding with "also stating the matter or matters in dispute and the contention of the petitioner with reference thereto."

At most, the defendants would be required only to state their contentions with reference to the matters in dispute "as disclosed by the petition."

Here the plaintiff did not state the second injury and its results as a matter in dispute, nor his contentions in reference thereto. The statute has no application here. We need not construe it further than to reach that conclusion.

It is suggested in the briefs that the foundation of the trial court's ruling on the motion to strike and the contention that the fact of a second injury was an affirmative defense which had to be pleaded rests upon our decision in Otoe Food Products Co. v. Cruickshank, 141 Neb. 298, 3 N. W. 2d 452, 142 A. L. R. 816. We there held: "Where an employer alleges that a second injury, other than one suffered by the employee in the course of his employment, constituted the proximate cause of the loss of sight of the employee's right eye, such allegation is affirmative, and the employer has the burden of proving the same with reasonable certainty, and, by his failure to so prove, compensation will be

based upon the injury received by the employee in the course of his employment."

An analysis of that case shows that it was misconstrued. In that case the employer was the plaintiff. The employer alleged that the employee had received an eye injury and that he had been paid temporary total disability compensation and medical expenses. The employer then alleged a second accident and injury and that the second accident was not suffered in the course of employment by the plaintiff. The second accident and injury as the proximate cause of the employee's loss of vision was the basic fact put in issue by the plaintiff employer. We held correctly that it was an affirmative allegation which the employer was required to prove to sustain his petition. The decision does not hold that a second injury is an affirmative defense which has to be pleaded if relied upon.

The long-established rule is: "When an answer to a petition consists of a general denial, the defendant may introduce such testimony as will tend to disprove the testimony of the plaintiff in support of his petition. For such purposes no other allegations in the answer are necessary." Alberts v. Pickard, 148 Neb. 764, 29 N. W. 2d 382.

In that case the petition alleged the sale of an automobile to a minor. We held that under a general denial evidence to the effect that the minor was not the purchaser of the automobile was admissible.

The rule above was stated originally in Broadwater v. Jacoby, 19 Neb. 77, 26 N. W. 629. The defendant purchased hogs from plaintiff's wife. Plaintiff claimed ownership of the hogs and sued for conversion. We held that evidence of the defendant that tended to contradict the allegations of the petition that plaintiff was not the owner of the hogs was competent under a general denial.

Wiedeman v. Hedges, 63 Neb. 103, 88 N. W. 170, was an action to recover the value of material sold by the plaintiff to the defendant. The answer was a general

denial. Defendant offered evidence that the material was sold to a partnership of which defendant was a member. We held the evidence offered by defendant to be admissible under a general denial as controverting and rebutting facts which the plaintiff was required to establish.

Hughes Co. v. Farmers Union Produce Co., 110 Neb. 736, 194 N. W. 872, 37 A. L. R. 1314, was a suit upon accounts. The action was against defendants as partners. The answer was a general denial. The defense was that the named defendants were in fact a corporation de facto. We held that the evidence as to a de facto corporate existence was admissible as tending directly to contradict the allegations of the petition.

So here we hold that evidence of the accident and resulting injury of September 1955 as the proximate cause of plaintiff's disability was admissible under the general denial. It tends directly to contradict the allegations of the plaintiff's petition that the accident of August 1954 was the cause of his injury and present disability. That evidence is for consideration here.

The fact situation here is not in serious dispute.

The plaintiff at the time of the hearing was 34 years of age. He had some time prior to the first accident, later referred to herein, suffered from "charlie horses" or muscle cramp in his legs. There is evidence that could relate these incidents to beginning after he had played football in his high school days. At any rate he testifies that they occurred not frequently, but prior to August 3, 1954. At that time plaintiff was an employee of the defendants as a carpenter. A rock slide occurred and a rock hit his lower back causing bruises and muscle injury. He was examined by defendants' doctor, and normal X-rays were taken. No severe injury was found. He was found to be able to resume his regular employment and did so for the following 6 or 8 weeks. He did not again ask for medical care although he had treatments by a chiropractor for a few

times. He was then "laid off." During the following months he lost weight rapidly and then regained it by private medical treatment. We find no contention that the loss of weight had anything to do with his present disability.

He began work as a carpenter in March 1955 for a different employer, not a party to this proceeding. He worked as a carpenter and carpenter foreman for this second employer until September 21, 1955. During this period the frequency and severity of the "charleyhorse" trouble increased somewhat but was in nowise disabling.

On September 21, 1955, a scaffold fell on plaintiff striking his right thigh above the knee. It was not disabling. This accident was not reported to the plaintiff's employer. However, pain developed after the accident in his leg and back. Plaintiff went to the doctor September 22, 1955, with severe and disabling pain. He was hospitalized September 24, 1955, and during the period of the examination gave the doctor the history of the accident of September 21, 1955. It was noted in his history on the hospital records and the physician testified to the fact that plaintiff told him of it. Plaintiff does not deny the statement or the fact of the second accident.

On Sepember 30, 1955, a myelogram revealed disc trouble in his lower back. On October 13, 1955, an operation was performed on plaintiff. The doctors found that he had a herniated disc and a ruptured disc.

Plaintiff made a normal recovery from the operation. It was followed by temporary total disability and there is a claim of partial permanent disability. The doctors who testified did not entirely agree on the differences between a herniated disc and a ruptured disc. They did substantially agree that a herniated disc may be congenital, caused by defective structure in the bones of the spine, or caused by trauma. They agreed that a herniated disc may be a condition of long stand-

ing and not necessarily disabling or revealing of its presence.

They agreed also that a ruptured disc makes its presence known almost immediately and often by severe and quite disabling pain.

Plaintiff's expert witnesses testified that in their opinions the accident of August 3, 1954, set up the groundwork of the herniated disc that later developed into the disabling situation of September 1955.

Defendants' expert witness doubted if the injury of August 3, 1954, had anything to do with the disc condition. He also held that the accident of September 21, 1955, "could be the precipitating factor," followed as it was by the disability. He further testified that a ruptured disc could occur without a previously existing herniated disc.

Plaintiff's doctor, who examined plaintiff in September 1955, testified that in his opinion the injury of August 3, 1954, would be a cause of pain in his back and legs "if he sustained a ruptured intervertebral disc." He further testified that, absent "other history of injury," based on the history given him, it was his opinion that plaintiff was suffering from a ruptured or herniated disc from sometime in 1954. On cross-examination one of plaintiff's doctors testified that a ruptured disc usually gives rather quick symptoms and that he doubted that the ruptured disc was caused by the accident of August 3, 1954. He further testified that the accident of September 21, 1955, "undoubtedly produced acute changes * * * That made it impossible for" plaintiff to work. He concluded with the opinion that "the injury of September 1955 was a very probable contributing factor and caused the rupture of the disk (sic)"; that the August 1954 injury "laid the groundwork so that another accident could create the total disability"; and that the rupture of the disc created the total disability.

The evidence shows, at most, that plaintiff suffered

an accident on August 3, 1954, which resulted in a herniated disc condition in his back; that this situation existed in March 1955 when he went to work for an employer, not a party to this action; and that it continued up until September 21, 1955, when he suffered the accident that was the cause of the disability for which he seeks compensation.

The question is: Must the 1954 employer respond and pay compensation benefits under the Workmen's Compensation Act?

Plaintiff relies on the rule stated in Tippett & Bond v. Moore, 167 Okl. 636, 31 P. 2d 583: " 'Where there have been two accidents to an employee, the question of whether the disability sustained by him should be attributed to the first accident or to the second accident depends on whether or not the disability sustained was caused by a recurrence of the original injury or by an independent intervening cause. * * * If the second injury is but a recurrence of the original injury, compensation therefor must be paid by the employer and insurance carrier at the time of the first injury.' "

We adopt the rule. It, however, requires amplification as to the determination of what constitutes "an independent intervening cause."

The Supreme Court of Michigan answered that question in Brinkert v. Kalamazoo Vegetable Parchment Co., 297 Mich. 611, 298 N. W. 301. In that case, as here, the first accident set up the condition which was aggravated to the point of disability by the second accident. The two accidents were not associated in any way except that they both contributed to the same end. The rule established by that case is that where the first accident was not a proximate cause of the second accident, the second accident constitutes an independent intervening cause.

Here it is manifest that the first accident did not cause the second accident. The disability, as dis-

tinguished from the condition, resulted from the second accident.

Plaintiff relies on Otoe Food Products Co. v. Cruickshank, *supra*. There we concluded that the second accident under the facts was not an independent intervening cause of plaintiff's loss of vision.

Plaintiff relies further on Tippett & Bond v. Moore, *supra*, and Deep Rock Oil Corp. v. Betchan, 169 Okl. 42, 35 P. 2d 905.

The above decisions must be analyzed in the light of the fact that the appellate court was required to accept the findings of fact made by the commission if supported by competent evidence.

In Tippett & Bond v. Moore, *supra*, the commission found that the second "occurrence" was a "recurrence of the original injury." The appellate court found competent evidence to support the finding and affirmed the award.

In the Deep Rock Oil Corporation case there was an accident with resulting compensable injury. There was a later "incident" which the employer claimed was a subsequent and noncompensable injury. The court held that: "Not every incident following an injury which physically aggravates it can be treated as a responsible intervening agency." The court affirmed the order of the commission, as sustained by the record, in disregarding the second incident as a responsible cause. In doing so, the court relied upon Head Drilling Co. v. Industrial Accident Commission, 177 Cal. 194, 170 P. 157. In that case the employee had sustained a severe fracture of his leg in a compensable accident. While convalescing at home, in an attempt to save himself from a fall, the employee struck the injured leg against a piece of furniture and the broken bone separated. The court held that this was a result to have been reasonably anticipated and was a proximate result of the original injury. The court found support in the evidence for that conclusion and sustained the award. Our decision in the

Otoe Food Products Company case is consistent with this decision.

In its decision the California court referred to Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P. 24. In that case the employee received a broken arm in July 1914 and was paid compensation. Several weeks later the bone separated as a result of careless use of the arm or by new accident. The commission allowed compensation without regard to the fact that the additional disability arose from a subsequent intervening cause. The court held that there was no evidence to sustain the award as made, and annulled it.

This distinction is made clearer in the cases that followed in the Oklahoma court.

In Rialto Mining Co. v. Perry, 200 Okl. 474, 196 P. 2d 687, the employee was operated on for a hernia and had recovered. He later entered the defendant's employ and suffered a hernia which came through the scar of the operation. The evidence was conflicting as to whether the hernia was a recurrence of the original hernia or due to an independent or intervening cause. The court on appeal ordered the commission to determine that fact.

In Sutton & Sutton v. Courtney, 203 Okl. 590, 224 P. 2d 605, the employee on July 15, 1949, slipped and fell causing injury and pain to his right hip. On the following day, while working on a job covered by a different insurance carrier, he felt pain in his back. He suffered a ruptured intervertebral disc. The physicians were not in agreement as "to the time the injury occurred." The commission held that the disability was caused by the first incident. The court held that the evidence sustained the finding and affirmed the award.

In Sigler v. Tillery & Jones (Okl.), 292 P. 2d 423, the employee sustained an injury to his back on April 23, 1953. He was operated on for a spinal injury and paid compensation. On September 18, 1954, while working for another employer in lifting and stacking truck tires

"something popped in his back." The commission held that the employee's condition was the result of a new accident on September 18, 1954. The court on appeal held that the finding was supported by the record, and affirmed the award.

Plaintiff also relies upon Continental Casualty Co. v. Industrial Commission, 63 Utah 59, 221 P. 852. The commission found that the second accident was not a recurrence of the injury caused by the first accident. On appeal the court held that the finding was not supported by any substantial evidence and vacated the order. The court held that the second accident was a recurrence of the first injury.

Plaintiff relies further on Jarrett v. Travelers Insurance Co. (Tex. Civ. App.), 66 S. W. 2d 415. That case was an appeal by the employee from an unsatisfactory award. In that case there were two accidents on two different dates. The court held that the award included compensation for the injury occasioned by the two accidents. The question here does not seem to have been presented or decided in that case.

Plaintiff further relies on Phillips v. Holmes Express Co., 190 App. Div. 336, 179 N. Y. S. 400. That decision rests on the finding that "nothing would have occurred on" the day of the second accident but for the first accident. The case is consistent in result with Brinkert v. Kalamazoo Vegetable Parchment Co., *supra*. Such a finding cannot be made here. In fact the evidence is conclusive that the accident of September 21, 1955, had no relationship to the accident of August 3, 1954.

When analyzed the plaintiff's cases sustain the rule that there must be a causal relationship between the first accident and injury and the second accident in order to sustain an award such as is sought here.

The rules are: "In order to recover, the burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an acci-

dent arising out of and in the course of his employment. * * * An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence." Jones v. Yankee Hill Brick Manuf. Co., 161 Neb. 404, 73 N. W. 2d 394.

The necessary conclusion is that plaintiff has not met the requirements of the burden of proof.

The judgment of the trial court is affirmed.

AFFIRMED.

IN RE APPLICATION OF ALL NEBRASKA RAILROADS. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLEES, V. HERMAN BROS., INC., ET AL., APPELLANTS.
82 N. W. 2d 395

Filed April 12, 1957. No. 34040.

1. **Public Service Commissions.** Courts should review or interfere with administrative and legislative action of the railway commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights.
2. **Public Service Commissions: Appeal and Error.** On appeal to the Supreme Court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.
3. ———: ———. Upon appeal to this court from a decision of the railway commission involving charges of a railway company or other common carrier, this court will consider that the rates fixed by the commission are just and equitable and constitute prima facie evidence of that fact.
4. **Carriers.** Within the contemplation of section 75-402, R. R. S. 1943, the lowest rates published or charged by any railway company for substantially the same kind of service, whether in this or another state, shall, when introduced in evidence, be accepted as prima facie evidence of a reasonable rate for the service under investigation.
5. **Public Service Commissions: Carriers.** Section 75-410, R. R. S. 1943, specifically authorizes the railway commission to put into effect certain rates when an emergency exists. The commission,

in doing so, exercises its legislative authority to regulate rates as authorized, to declare an emergency, and to prescribe the time when such rates shall become effective.

6. ———: ———. Where the state railway commission specifically adopts the rates and charges fixed by the Interstate Commerce Commission as its own, they become the regularly fixed rates and charges of the state railway commission until altered or set aside.
7. ———: ———. Rates and charges duly established by the railway commission, until altered or set aside, have the effect of a legislative enactment.
8. ———: ———. Only unjust discrimination or undue preference under substantially similar circumstances and conditions is that which is unlawful and prohibited.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

Robert E. Powell, for appellants.

J. A. C. Kennedy, R. D. Neely, Guy C. Chambers, G. C. Holdrege, and *J. W. Weingarten,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an appeal from an order of the Nebraska State Railway Commission, hereinafter called the commission, in which the commission approved and allowed to become effective certain proposed rail rates governing the transportation of petroleum and petroleum products from points of origin in the State of Nebraska to points of destination in this state, when such traffic moves in intrastate commerce. The appeal was perfected by Herman Bros., Inc., and other highway motor carriers who filed a protest and request for formal hearing in opposition to an application filed with the commission by the Chicago, Burlington & Quincy Railroad Company and other railroad companies carrying such products as freight.

On November 21, 1955, the appellees made application in writing to the commission requesting permission to

establish, effective December 1, 1955, intrastate in Nebraska, rates on petroleum and its products published in tariff 448. The proposed rates were based generally 1½ cents per 100 pounds less than truck rates for distances of 75 miles and more, and on truck rates for less than 75 miles, except when present rail rates were lower than present truck rates, such rail rates were to be maintained.

On November 23, 1955, the appellants filed a pleading titled "Protest and Request for Formal Hearing" before the commission, in which the appellants alleged that the proposed rates were unreasonably low, were noncompensatory, unlawfully prejudiced the appellants and deprived them of traffic to which they were rightfully entitled, and would not foster sound economic conditions in motor transportation. The prayer was that the application be denied.

On December 28, 1955, the matter came on for hearing before the commission upon the application of appellees and the protest of the appellants, and hearing was had to the commission.

On December 30, 1955, the commission entered its order granting the appellees, which were all Nebraska railroads, namely: Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Rock Island and Pacific Railroad Company; Chicago, Saint Paul, Minneapolis and Omaha Railway Company; Missouri Pacific Railroad Corporation in Nebraska; and Union Pacific Railroad Company, authority to apply the rates, rules, and charges as set forth in Western Trunk Line Tariff 448 regarding shipments of petroleum and petroleum products moving in Nebraska intrastate traffic. It was further ordered that an emergency existed, and the said order should become effective January 1, 1956.

On January 11, 1956, appellants filed a motion for rehearing. On March 12, 1956, the commission issued its order overruling the motion for rehearing. From

the order overruling the motion for rehearing, appeal was taken by the protestants to this court.

The record discloses that on or about October 20, 1955, the appellees, with other western trunk line rail carriers, filed with the Interstate Commerce Commission freight tariff 448 naming specific carload rates in cents per 100 pounds from 14 rail shipping points in Kansas, Iowa, Nebraska, Missouri, and Minnesota to all rail stations in Nebraska for the rail transportation in tank cars of petroleum oil and its products, to become effective December 1, 1955.

The rates proposed for Nebraska intrastate rail carriage are those set forth in tariff 448, and are the same rates that were made effective by that tariff on interstate traffic on December 1, 1955. The Nebraska rail shipping points from which rates were proposed were Omaha, Superior, Doniphan, Scottsbluff, and South Omaha, where, except at South Omaha, pipe-line terminals or refineries are located.

The rates shown in tariff 448 are generally 1½ cents per 100 pounds less than truck rates on gasoline for distances of 75 miles and over. For distances under 75 miles, the rates are the same as the truck rates, except in cases where the existing rail rate was already lower than the truck rate, then the existing rail rate was not changed. The proposed rates were not subject to current Ex Parte 175 increases, except the rates from Omaha and South Omaha. The rates from other points like Doniphan, Superior, and Scottsbluff were not made subject to that increase because the appellees were trying to meet truck competition and the trucks do not have any Ex Parte 175 increases on their rates. The proposed rates constitute reductions from existing rail rates.

Official motor vehicle truck tariff No. 5 was used in ascertaining the truck rates. That tariff states rates in cents per gallon, and to ascertain the rate in cents per 100 pounds, a weight of 6.6 pounds per gallon was used,

carried to 3 decimal points. The truck rate on gasoline was used as it was lower than the truck rate on heavy oils, and gasoline constitutes the bulk of the traffic. Appellees were endeavoring to meet the competition of the truck rates on the commodity that was moving in the greatest volume. The rail rates on gasoline are normally on a higher basis than rail rates on the heavier oils, while the reverse is true of truck rates, and in meeting truck competitive rates appellees reduced the rail rate on gasoline and made the reduced rate applicable to both gasoline and heavier oils. Since the average rail loading carload on the heavier oils is 33.8 tons compared with 27.2 tons on gasoline, appellees could not justify a higher rate on the heavier oil.

Since the reduced rates on interstate traffic to Nebraska points had been in effect since December 1, 1955, from Council Bluffs and Sioux City, Iowa, and the Kansas City, Missouri, districts and a terminal at Omaha involving an interstate movement and intrastate rates to Nebraska points from Doniphan, Superior, and the other Omaha terminal had not been reduced, shippers from the latter were being discriminated against and it was necessary that this discrimination be removed by reducing the intrastate rates to the basis already established for interstate movement as set out in tariff 448. The interstate rates from Omaha, Council Bluffs, and other out of Nebraska origin points were approximately 1½ cents lower than the intrastate rate from Nebraska shipping points for the same distances.

In the transportation of petroleum products by rail in Nebraska and elsewhere in competition with appellant highway carriers, appellees are at a disadvantage in that the rail customer is required to provide by ownership or lease the rail cars, whereas all equipment is furnished by the truck carrier; and the rail shipper must clean the rail cars, whereas cleaning of truck equipment is performed by the truck carrier. The rail shipper must keep records and accounts of rail car movements, but

no such accounting is required of the truck customer. Rail service is slow as compared with truck service. Shippers must load and consignee unload rail shipments without assistance from rail carrier, whereas the truck driver usually assists in loading and unloading. The rail customer must provide large storage facilities and maintain larger inventories, all of which requires a larger capital investment than the truck customer who requires smaller storage facilities and smaller inventories. Rail customers must generally provide and maintain track facilities where none is required for truck service. Rail carriers cannot make off-track deliveries as can the highway trucks.

In 1940, 780,000 tons of gasoline were consumed in Nebraska of which appellees transported 374,000 tons, or 48 percent. By 1953, the total consumption of gasoline in this state increased to 1,755,000 tons of which the appellees transported 100,000 tons, or 5.7 percent. Appellees' originated tonnage in Nebraska declined from 233,939 tons of gasoline in 1940, to 52,736 in 1953; and 56,493 tons of fuel, road, and residual oils in 1941, to 14,515 in 1953. Appellees' terminated tonnage declined from 374,401 tons of gasoline in 1940, to 99,532 tons in 1953; and from 166,986 tons of fuel, road, and residual oils in 1940, to 92,097 tons in 1953.

In 1950, the appellees, with other western trunk line carriers, filed a tariff with the Interstate Commerce Commission establishing rates on petroleum effective February 1st on interstate traffic between points in Colorado, Wyoming, South Dakota, Nebraska, and Kansas 1½ cents per 100 pounds under the truck rates for all distances. Appellees intended to extend this basis of rates between all points in the territory tributary to Nebraska, if the rates thus proposed were allowed to go into effect, in an effort to establish rail rates on a competitive basis with highway carriers.

The proposed reduced rates were protested by highway motor carriers and suspended pending hearing

thereon in a proceeding before the Interstate Commerce Commission known as I. & S. docket No. 5853. That commission, after hearing (289 I.C.C. 457), decided on June 30, 1953, that the proposed rates of 1½ cents per 100 pounds under truck rates were necessary and proper for distances of 75 miles or more, but denied the reduction for distances less than 75 miles.

The protesting motor carriers brought suit to set aside the decision of the Interstate Commerce Commission. On November 1, 1954, a three-judge federal court sustained the order of the commission. Ward Transport v. United States, 125 F. Supp. 363. The United States Supreme Court affirmed the lower court on April 4, 1955. Ward Transport v. United States, 348 U. S. 979, 75 S. Ct. 570, 99 L. Ed. 762. Following that decision, tariff 448 was prepared and filed. The rates therein proposed were delayed by the litigation described from 1950 to the fall of 1955. The rates appearing in tariff 448 and allowed to go into effect by the Interstate Commerce Commission were in accord with that commission's ruling in I. & S. docket No. 5853, and the rates published in tariff 448 reflect the same formula approved by the Interstate Commerce Commission in its decision concerning I. & S. docket No. 5853.

The average operating cost of the different appellees of transporting freight traffic per car-mile ranged from 21.72 cents on the Union Pacific Railroad to 35.16 cents on the Chicago, Saint Paul, Minneapolis and Omaha Railroad. The additional cost of handling additional cars on present trains is imperceptible. In the event additional trains are required, the added cost is estimated at less than 50 percent of the above cost figures. The proposed rates will yield revenue per car-mile exceeding the average operating cost per car-mile of each of the appellees and by a greater margin the estimated added cost of handling additional traffic, if required. Where reductions in the existing rates occur, the revenue per car-mile from the proposed rates is from approximately

60 to 80 cents and generally exceeds 50 cents. The costs per car-mile as shown by exhibit No. 11 are system figures, and if the traffic involved in this case will produce car-mile revenue in excess of such costs, such traffic will be contributing to net revenue and therefore will be compensatory.

Consumption of gasoline in Nebraska has increased materially from 1951, so that the average consumption exceeds 500 million gallons annually. The proposal of appellees to establish rates of 1½ cents per 100 pounds under the truck rates amounts to about $500,000 annually on that quantity of fuel.

No witnesses testified for the appellants.

The appellants make reference to testimony in which they claim that at numerous points of destination to which reduced rates are proposed, no bulk plant or storage facilities for petroleum products are located on rail sidings; that in numerous instances the proposed rail rates do not adhere to the formula of being 1½ cents per 100 pounds less than the truck rates for distances beyond 75 miles; that in some instances the proposed rail rates are four or more cents per 100 pounds less than the presently existing truck rates on gasoline; and that as shown by the testimony of one of appellees' witnesses with reference to the transportation of heavier fuels, such as tractor fuel, distillate, burning oils, etc., the proposed rail rates would, in a great majority of cases, be much more than 1½ cents per 100 pounds less than the existing motor carrier rates on the same commodities.

The appellants assign as error: (1) That the order of the commission dated December 30, 1955, is unlawful, null, and void, in that the same provides that said order shall become effective within less than 10 days from the date said order was mailed to all parties at interest, contrary to the laws of this state; (2) that the commission's order of December 30, 1955, which authorizes and approves the rates, rules, and charges set forth in west-

ern trunk line tariff 448, is arbitrary, unreasonable, and contrary to law for the reason that the order is based on insufficient competent evidence and is devoid of lawful findings that said rates are not preferential and unjustly discriminatory; (3) that the order of the commission is arbitrary, unreasonable, and contrary to law in that there is no finding by the commission that the rates, rules, and regulations proposed to be established are reasonable and compensatory, there being no sufficient competent evidence that the same are reasonable and compensatory; and (4) that the order of the commission is arbitrary, unreasonable, and contrary to law in that said order would destroy rather than develop and preserve a highway transportation system properly adapted to the needs of commerce in Nebraska, and destroys rather than improves the relations between, and coordination of, transportation by motor carriers and other carriers as contemplated by the laws of this state.

In considering the assignments of error necessary to a determination of this appeal, we deem the following authorities pertinent.

Section 75-403, R. R. S. 1943, provides, in substance, that upon appeal prosecuted by any railway company or common carrier from a decision involving charges of such railway company or common carrier mentioned in such decision, the courts of this state will consider that the rates fixed by the commission are just and equitable and constitute prima facie evidence of that fact.

As stated in Farmers Union Livestock Commission v. Union P. R. R. Co., 135 Neb. 689, 283 N. W. 498: "This court is committed to the rule that a rate put into effect by order of the railway commission has the force of a statute on the subject. Unless held to be unreasonable and arbitrary by the courts, it expresses the only reasonable rate governing the subject-matter contained in the order."

In Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb.

562, 272 N. W. 756, it was held: "Courts should review or interfere with administrative and legislative action of the railway commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights. * * * On an appeal to the supreme court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made."

The appellants contend that the commission is precluded by law from making any order issued by it effective on less than 10 days notice. In this connection, the appellants make reference to the following sections of the statutes.

Section 75-405, R. R. S. 1943, provides, in substance, that if any railway company, common carrier, or person affected thereby, shall be dissatisfied with the decision of the commission affirming, revising, annulling, or modifying any rate or rates complained of in the original schedule, or any subsequent schedule, which may be the subject of investigation, or with the decision of the commission with reference to any rate, classification, rule, charge, order, act, or regulation made or adopted by them, such dissatisfied railway company, common carrier, or person affected may institute proceedings in the Supreme Court to reverse, vacate, or modify the order of which complaint is made.

The pertinent part of section 75-406, R. R. S. 1943, is in substance as follows: The procedure to obtain such reversal, modification, or vacation of any such order or regulation made and adopted shall be governed by the provisions in force with reference to appeals from the district courts to the Supreme Court; provided, no motion for a new trial shall be required to be filed, but instead a motion for rehearing shall be filed within 10 days after the mailing of a copy of such order to the per-

sons affected, and the time for appeal shall run from the date of the ruling of the commission.

The pertinent language contained in section 75-415, R. R. S. 1943, is in substance as follows: The order or orders, together with the findings of fact and the conclusions of the commission based thereon, shall be reduced to writing and spread upon the record, and a copy thereof, with the date when the order or orders shall go into force and effect, shall be furnished to the party who complained, and any other person or persons directly interested therein, and such order or orders shall go into force and effect at such time as is, within the discretion of the commission, just and reasonable; provided, always, no order or orders shall go into force and effect within 10 days after the mailing of such notice to the persons affected thereby.

The appellants argue that the order of the commission dated December 30, 1955, to become effective January 1, 1956, involving the rates in question was not mailed to any of the parties at interest until January 7, 1956, or 1 week after such order was purportedly in full force and effect, therefore, until receipt of the official order of the commission these appellants, or any other interested party to the proceedings, had no official notice of the action taken by the commission in connection with this matter.

The appellants contend that the effective date of said order should be stayed until such time as the commission has finally passed upon the motion for rehearing which was timely filed in accordance with the provisions of section 75-405, R. R. S. 1943, and was not decided by the commission until March 12, 1956; that in view of section 75-415, R. R. S. 1943, above, the order entered by the commission could not under any circumstances have become effective prior to January 17, 1956, which was 10 days after said order was mailed to the parties at interest in this proceeding; and that consequently the order of the commission dated December 30, 1955, is in

direct violation of section 75-415, R. R. S. 1943, and is null and void.

We make reference to section 75-410, R. R. S. 1943, which in substance provides that to prevent interstate rate wars and injury to the business of the citizens of the state, railway companies or common carriers, or in case of any other emergency to be judged by the commission, it shall be the duty of the commission, notwithstanding section 75-409, R. R. S. 1943 (which section relates to rate order, injunction, and conditions precedent), to temporarily alter, amend, or suspend any existing freight rates, tariffs, schedules, orders, and circulars of any railway company or common carrier, or part thereof, in this state, and to fix freight rates where none exist, which emergency rate or rates shall apply to any one or more or all railway companies or common carriers in this state, and shall take effect at such time, and remain in force such length of time, as may be prescribed by the commission. Such emergency rates, tariffs, schedules, orders, and circulars shall be subject to review upon a hearing before the commission and courts of competent jurisdiction in this state, as herein provided for other schedules of rates fixed by the commission.

Pursuant to section 75-410, R. R. S. 1943, and the authority granted therein, the commission found, as stated in its order of December 30, 1955, that an emergency existed necessitating that the rates set forth in tariff 448 become effective on intrastate commerce on January 1, 1956.

Section 75-410, R. R. S. 1943, is a section of the statutes which specifically authorizes the commission to put into effect rates such as set forth in tariff 448 when an emergency exists. The commission was exercising its legislative authority to regulate rates as authorized, to declare an emergency, and to prescribe the time when such rates should become effective. That such emergency existed is shown when it appears that identical rates were in effect on interstate traffic in Nebraska, and

it was necessary to establish the same rates on intrastate traffic to prevent discrimination against intrastate shippers. The order of the commission could have been superseded under section 75-408, R. R. S. 1943. The record discloses no attempt on the part of the appellants to do so. We find the appellants' assignment of error to be without merit.

The appellants contend that the commission, in approving rates of railway companies and other common carriers, is charged with the duty of seeing that such rates so approved are reasonable, not preferential, or unjustly discriminatory.

The appellants cite section 75-208, R. R. S. 1943, which provides in substance that the commission shall have the power, and it shall be its duty, to make all necessary classifications, and to fix all necessary rates, charges, and regulations to govern and regulate the freight and passenger tariffs of railway companies and common carriers, the power to correct abuses and prevent unjust discrimination, extortions, and overcharges in rates of freight and passenger tariffs on the different railroads in this state, and enforce the same by having the penalties inflicted as provided in sections 75-310 and 75-311, R. R. S. 1943.

The appellants argue that the witness for the appellees testified to the effect that in establishing the proposed rates the railway lines based the same on the rates being charged by motor carriers for transportation of gasoline, which rates, in numerous instances, are lower than the rates charged by motor carriers for transportation of heavier commodities such as distillate, fuel oil, and other similar products; that in numerous instances the rates herein proposed are not subject to a recent 15 percent general increase which applies to most other traffic being handled in this state by rail carriers for interstate application, therefore, such rates would be preferential to shippers of petroleum products in this state, and discriminatory against shipments of other com-

modities which contain the 15 percent increase in rates; that the railroads, in many instances, have named rates to points of destination where there are no bulk plants located on rail sidings, and as a result no traffic actually will move from said points using said rates; that in the above instances receivers of petroleum products at points where no rail storage or unloading facilities are provided are discriminated against for the reason that the receivers of petroleum products who do not have bulk plants or storage facilities located by rail right-of-ways would not be able to take advantage of the proposed rail rates, and as a consequence they would be forced to pay transportation charges by motor vehicle on the movement of gasoline in Nebraska intrastate commerce, which would be 1½ cents per 100 pounds higher than receivers of petroleum products who could obtain the same by way of rail movement; and that on a shipment of heavier fuels such as distillates, and other similar commodities, receivers by railroad would have a greater advantage over the receivers of these same commodities by way of motor vehicles because of the fact that in most instances the rates proposed by the railroads in this proceeding on the movement of so-called heavier fuels amounted to more than 1½ cents per 100 pounds below the presently existing motor carrier rates on similar commodities.

Section 75-209, R. R. S. 1943, is referred to. This section provides in substance that it shall be the duty of the commission to fairly and justly classify all freight and property of whatsoever character, and to fix to each class or subdivision of freight a reasonable rate, for each railway company or common carrier. It further provides that said classifications shall be the same for all railway companies or common carriers.

Appellants contend this section of the statutes was not followed; that nowhere in the commission's order of December 30, 1955, is there any finding to the effect that the rates proposed are reasonable, compensatory

rates, and that the evidence does not sustain such a finding; that while a witness for the railroads stated that in his opinion the rates are compensatory, the railroads did not attempt to introduce any cost figures which would show the cost of handling this type of traffic, thus, the record being deficient in this respect, it does not enable the commission or any interested person to determine with any degree of accuracy whether or not the rates proposed are reasonable rates, and further, whether or not said rates are compensatory; that the rates set forth in tariff 448 are proposed merely for competitive reasons and bear no relationship to the cost of handling the traffic; and that the mere fact that the involved rates are based entirely on the rates established and prescribed by the commission for transportation by motor vehicle, which is an entirely different mode of transportation, is conclusive on this point.

Appellants further contend that by the establishment of the proposed rail rates on the basis of a differential of 1½ cents per 100 pounds below the lowest rates of motor carriers for the transportation of gasoline, the commission has destroyed rather than attempted to preserve the inherent advantages of motor carrier transportation contrary to the public interest, and has worsened relations between motor carriers and rail carriers; and that the order of the commission will tend to adversely affect the traffic and revenue of the motor carriers of petroleum products in this state and destroy, rather than preserve, a highway transportation system properly adapted to the needs of commerce of this state, contrary to legislative policy. Therefore, the order, which is the subject matter of this appeal, is arbitrary and unreasonable, and is null and void.

It is apparent from the evidence that the appellees have not been on a competitive basis with the motor carriers as shown in the decline of the tonnage of gasoline carried by the appellees as against that carried by

appellants or those engaged in the same business. In this connection, the following applies.

Section 75-402, R. R. S. 1943, provides in part: "The lowest rates published or charged by any railway company for substantially the same kind of service, whether in this or another state, shall, when introduced in evidence, be accepted as prima facie evidence of a reasonable rate for the services under investigation."

The interstate rates shown in tariff 448 are published and charged for the identical service in interstate transportation that the appellees proposed and the commission authorized for intrastate service in this state.

Where the state railway commission specifically adopts the rates and charges fixed by the Interstate Commerce Commission as its own, they become the regularly fixed rates and charges of the state railway commission until altered or set aside. See Farmers Union Livestock Commission v. Union P. R. R. Co., *supra*.

In addition, with reference to the proposed rates, the appellees and other western truck line carriers in 1950 filed a tariff with the Interstate Commerce Commission establishing rates 1½ cents per 100 pounds under truck rates applicable to petroleum and its products for all distances between points in Colorado, Wyoming, South Dakota, Nebraska, and Kansas. The motor carriers protested this application which resulted in investigation and suspension docket No. 5853 before the Interstate Commerce Commission in which that commission approved the proposed rates for distances of 75 miles or more, but not for lesser distances, on June 30, 1953. See 289 I. C. C. 457. In its decision the Interstate Commerce Commission said: "The record is convincing that in the territory here considered the railroads cannot successfully compete with the motor carriers at equal rates, and that the proposed rates are not lower than necessary to meet the truck competition and are compensatory, except for the shorter hauls." The protesting motor carriers then brought suit in the United States district court

for Colorado to set aside the commission's decision, before a three-judge court which upheld the decision of the commission. See Ward Transport v. United States, 125 F. Supp. 363, which was decided November 1, 1954. On April 4, 1955, the United States Supreme Court affirmed the decision of the lower federal court. Ward Transport v. United States, 348 U. S. 979, 75 S. Ct. 570, 99 L. Ed. 762.

Other cases relating to other areas are not important or material in the instant case unless the Interstate Commerce Commission reverses its decision in I. &. S. docket No. 5853 and prescribes some other formula of rates to be followed.

As indicated by the authorities heretofore set out, the commission was not required to make any specific finding as to whether the rates were reasonable or preferential.

In the light of the evidence and the foregoing authorities, the contention of the appellants that the proposed rates were not just, reasonable, and compensatory is without merit.

The appellants contend that the proposed rates are discriminatory.

In 13 C. J. S., Carriers, section 377, on page 843, relating to circumstances justifying discrimination in rates, the rule is stated as follows: "Although a common carrier is bound to carry at equal rates for all customers in like condition, * * * mere discrimination does not render a rate illegal; only such rates as are unreasonably or unjustly discriminatory are inhibited. In other words, mere inequality of charge does not necessarily constitute undue or unreasonable preference or advantage, and cannot be held illegal unless it is shown that it is not justified by the cost of the respective services, by their values, or other transportation conditions. Further, any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge, since common carriers are only bound to give the same terms to all persons alike, under the same conditions

and circumstances. Accordingly, no claim of illegality can be sustained if, in view of all the circumstances, the discrimination is fair and reasonable, and not inconsistent with the public interest, and, subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, * * *."

Any rate that is competitive discriminates to some extent against a competitor, but that does not make the rate unlawful for the reason that only unjust discrimination or undue preference under substantially similar circumstances and conditions is that which is unlawful and prohibited.

The proposed rates in many instances are not subject to Ex Parte 175 increases of 15 percent because the rates were intended to meet the appellants' competition, whose rates have not been increased. The fact that such increases had been made effective on other commodities by appellees does not establish unjust discrimination. Neither does the fact that the proposed rate on heavier oils will be more than 1½ cents per 100 pounds below the truck rates on the same commodity. The claim of the appellants that the proposed rates prefer shippers and receivers who have rail shipping facilities and thus discriminates against those who have no such facilities is without merit. To any person who is in a position to use the service offered, such service is available to him.

The complaint of the appellants that the commission made no finding whether the rates were reasonable and not discriminatory is without merit. The law of this state does not require the commission to make such a finding. Should any unlawful discrimination exist or develop now or in the future, it is subject to correction on complaint made to the commission, supported by evidence. Until then undue preference or unlawful discrimination are not to be presumed. The appellants'

assignment of error of undue preference and unlawful discrimination cannot be sustained.

We fail to find by the evidence anything that would destroy the inherent advantages of motor transportation, or that would tend to destroy the highway system of this state by making effective the rates shown in tariff 448. There is no apparent violation of section 75-222, R. R. S. 1943, which section relates to the legislative policy of the state regulating motor carriers and referring generally to transportation within the state.

The appellants assign as error a denial of their motion for continuance to a later time in order to enable them to present evidence in opposition to the appellees' application. This motion was overruled by the commission. The appellants present no argument in their behalf, or discussion in support of this assignment of error. It need not be discussed.

The record disclosing competent and relevant evidence in support of the findings of the railway commission upon the questions of fact presented, and, no violation of any rule of law or constitutional right appearing, nor that the action of the commission was arbitrary or unreasonable, this court will not substitute its judgment for that of the railway commission, and its order should be, and is, affirmed.

AFFIRMED.

IN RE APPLICATION OF ALL NEBRASKA RAILROADS. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLEES, V. HERMAN BROS., INC., ET AL., APPELLANTS.
82 N. W. 2d 405

Filed April 12, 1957. No. 34041.

1. **Public Service Commissions.** Courts should review or interfere with administrative and legislative action of the railway commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights.

2. **Public Service Commissions: Appeal and Error.** On appeal to the Supreme Court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.
3. ———: ———. Upon appeal to this court from a decision of the railway commission involving charges of a railway company or other common carrier, this court will consider that the rates fixed by the commission are just and equitable and constitute prima facie evidence of that fact.
4. **Carriers.** Within the contemplation of section 75-402, R. R. S. 1943, the lowest rates published or charged by any railway company for substantially the same kind of service, whether in this or another state, shall, when introduced in evidence, be accepted as prima facie evidence of a reasonable rate for the service under investigation.
5. **Public Service Commissions: Carriers.** Where the state railway commission specifically adopts the rates and charges fixed by the Interstate Commerce Commission as its own, they become the regularly fixed rates and charges of the state railway commission until altered or set aside.
6. ———: ———. Rates and charges duly established by the railway commission, until altered or set aside, have the effect of a legislative enactment.
7. ———: ———. Only unjust discrimination or undue preference under substantially similar circumstances and conditions is that which is unlawful and prohibited.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

Robert E. Powell, for appellants.

J. A. C. Kennedy, R. D. Neely, Guy C. Chambers, G. C. Holdrege, and *J. W. Weingarten,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This appeal is directly related to a companion case, No. 34040, Chicago, B. & Q. R. R. Co. v. Herman Bros., Inc., *ante* p. 247, 82 N. W. 2d 395. While these cases were heard on separate records, in many respects the

principles involved are identical, and the issues in the two cases are so closely related that the argument of the appellants in opposing the orders issued by the Nebraska State Railway Commission, hereinafter referred to as the commission, are very similar. We have considered the two cases together, but deem it necessary to render separate opinions in connection with the same due to a different order of the commission affecting a different point of origin in this state to other stations in this state.

This appeal is from the order of the commission in which the commission approved and allowed to become effective certain reduced rail rates governing the transportation of petroleum and petroleum products in tank carloads from the point of origin, Kaneb, Nebraska, to 103 specified points of destination in this state, which traffic moves in intrastate traffic. The appeal is directed to the commission's order of February 7, 1956, approving the rates and charges proposed by Nebraska railroads, and as to the confirmation of said order by the opinion, findings, and order of the commission dated March 12, 1956, overruling appellants' motion for rehearing.

On December 29, 1955, Nebraska railroads filed an application with the commission for authority to revise rates from Kaneb, Nebraska, to Nebraska destinations, the rates proposed in the Western Trunk Line Tariff 448 to take the place of present rates.

On December 30, 1955, Herman Bros., Inc., and other Nebraska motor carriers filed a complaint and request for formal hearing before the commission. The commission set the matter for hearing on January 23, 1956. On February 7, 1956, the commission, by its order, authorized the proposed rates contended for by the applicants to be applied March 1, 1956. The appellants filed a motion for rehearing on February 21, 1956. Argument was had before the commission on the motion for rehearing on March 12, 1956. This motion was overruled on the same date. From the order overruling the mo-

tion for rehearing, the appellants have appealed.

We have reviewed the evidence in the companion case, No. 34040, and make reference to the evidence insofar as the same may be pertinent in the instant case. However, we deem some review of the record necessary in the instant case relating to the subject matter of this appeal as to the commission's order of February 7, 1956.

The record discloses that there is a pipe-line terminal at Kaneb, Nebraska, which is located 2 miles north of Geneva. Rail shipping facilities were constructed and completed at this pipe-line terminal. The commission authorized intrastate rail rates on petroleum on the same basis that the rail rates were then in effect from other rail shipping points in this state by order of the commission dated December 16, 1955. At that time the appellees' application to the commission, filed November 21, 1955, for permission to establish rates on petroleum from other rail shipping points in Nebraska to all Nebraska stations 1½ cents per 100 pounds under the truck rates on gasoline for distances of 75 miles or more, and rates no lower than the truck rates for distances less than 75 miles, was pending before the commission.

The Interstate Commerce Commission established rates, as shown in Western Trunk Line Tariff 448, on the same basis as the proposed rates requested by the rail carriers in their application before the commission, filed November 21, 1955. Such rates by the Interstate Commerce Commission became effective December 1, 1955, for interstate transportation in Nebraska pursuant to a decision of the Interstate Commerce Commission, I. & S. docket No. 5853, 289 I.C.C. 457. The Nebraska State Railway Commission granted appellees permission to establish such rates January 1, 1956, between such rail shipping points in this state, namely Omaha, South Omaha, Superior, Scottsbluff, and Doniphan, and Nebraska stations as published in tariff 448.

The proposed rates from Kaneb are set forth in a

schedule made a part of the appellees' application, and named rates to only 103 Nebraska stations because a shipper requested the rates to only the stations named. The appellees assert that if any shipper requests rates from Kaneb to other stations, the appellees will make proper application to the commission to establish such rates; and that the appellees limited the application of the rates to the stations requested in order to establish them as expeditiously as possible.

As previously stated, substantially the same facts set forth in our opinion in case No. 34040 involving appellants' appeal from the order of the commission authorizing the rates as set forth in tariff 448, effective January 1, 1956, are pertinent to this case. No useful purpose would be accomplished by again restating such facts.

The appellants refer to evidence to the effect that the proposed rail rates are, in some instances, to some degree more than 1½ cents a 100 pounds below the truck rates on heavier fuels.

The appellants also point to evidence in connection with the proposed car-mile earnings which is set forth in exhibit No. 1, stating that the car-mile earnings are figured on the absolute short-line mileage between point of origin and destination, rather than on the actual route of movement; that said car-mile earnings do not take into consideration switching costs or other costs of operation such as empty movement of tank cars; that no shipper appeared in support of appellees' application; also to evidence on behalf of appellants to the effect that the proposed reduced rail rates from Kaneb, and from other points of origin involved in the companion case No. 34040, were considerably less in the majority of cases than the existing rates of the motor carriers, this being true with reference to a comparison of the proposed rail rates from the various origins with the motor carrier rates on the heavier fuels.

The appellants introduced comparisons and analyses

of rates proposed by the appellees which they contend show that such proposed rates in the case at bar have no relation whatever to actual movements by way of rail, and will produce discrimination and inequalities.

There is other evidence of the appellants to the effect that even in instances where rail carriers have established rates lower than truck rates in any given area, the price of the commodity to the ultimate consumer has not been reduced; that while the number of rail tank cars suitable for the transportation of petroleum products has increased slightly since before World War II, the amount of such products has increased from about 2½ to 3 million barrels of crude oil per day prior to the war, to slightly less than 8 million barrels a day at the present time, and as a consequence the tank car fleet of this country is being operated at near maximum capacity; that if the differential theory of the appellees is approved it would have a tendency to increase competition by unregulated private carriers, which would act to the detriment of the motor common carriers and would not benefit the railroads; that the motor carrier rates from the Kaneb pipe-line terminal to points of destination in Nebraska were originally established by the motor carriers voluntarily, and based on the cost of motor carrier operation and not rail costs; and that in the past motor carriers have lost some traffic which they had handled previously when the railroads reduced rates below the existing motor carrier rates, and thus disrupted the parity of rates as between the two modes of transportation.

In this appeal it is not disputed that the commission granted the appellees permission to establish, effective January 1, 1956, similar rates from all Nebraska rail shipping stations except Kaneb to all Nebraska stations; nor is there dispute that similar rates became effective December 1, 1955, on interstate traffic from all rail shipping points in adjoining states to Nebraska stations and also between Nebraska stations when the Interstate

Commerce Commission did not suspend rates as set forth in tariff 448. It is not disputed that the aforesaid rates, including the proposed rates from Kaneb, were formulated in exact accord with the formula approved by the Interstate Commerce Commission in I. & S. docket No. 5853, 289 I.C.C. 457.

The granting of the application would place Kaneb rates on the same basis as other shipping points with respect to interstate rates as well as intrastate rates.

Section 75-402, R. R. S. 1943, provides in part: "The lowest rates published or charged by any railway company for substantially the same kind of service, whether in this or another state, shall, when introduced in evidence, be accepted as prima facie evidence of a reasonable rate for the services under investigation."

In this connection, we make reference to the citations of authorities in the opinion in case No. 34040 dealing with prima facie evidence.

We find nothing in the appellants' pleading or evidence tending to show why Kaneb should not be accorded rail rates in effect on the same basis from similar rail shipping points, and the appellants did not argue anything of that nature in their brief in the instant case. In fact, appellants' argument is almost in its entirety a repetition of their argument made in case No. 34040, wherein they contended that the rates were discriminatory against highway motor carriers; that the commission made no finding that the rates would not be discriminatory; that the proposed rates were not shown to be compensatory; and that they deprived appellants of a vested right under section 75-222, R. R. S. 1943. We have discussed and determined these matters in our opinion in case No. 34040.

With reference to the proposed rates from Kaneb, Nebraska, being discriminatory against shippers and appellants, the appellants cite the rate of 6 cents to Ong for a distance of 22 miles, a rate of 6 cents to York for a distance of 50 miles, a rate of 11 cents to Lincoln

for a distance of 60 miles, and a rate of 9 cents to Fairbury a rail distance of 124 miles. The highway distance to Fairbury is not shown, but is under 74 miles. Exhibit No. 1 discloses the truck rates from Kaneb to Ong to be 5.758 cents; to York 5.909 cents; to Lincoln 10.758 cents; and to Fairbury 9.091 cents. Thus, the proposed rates of 6 cents to Ong and York, 11 cents to Lincoln, and 9 cents to Fairbury are approximately the same or higher than the appellants' rates to the same points. Certainly, the appellants are not in a position to complain about such rates. Again, the appellees, in formulating the rates to these points were not permitted to go below the truck rates on gasoline for distances of less than 75 miles. That is the reason given by the appellees that the proposed rail rates are approximately the same as the truck rates to those points.

Exhibits Nos. 1 and 6 show that in most instances the revenue per car-mile under the proposed rates will yield more than double the operating cost per car-mile of handling freight traffic of the several appellees. For instance, the Chicago & North Western Railway Company shows a cost per car-mile of 33 cents; the Chicago, Saint Paul, Minneapolis & Omaha Railway Company, 35.16 cents; the Chicago, Burlington & Quincy Railroad Company, 24.96 cents; the Chicago, Rock Island & Pacific Railroad Company, 25.06 cents; the Union Pacific Railroad Company, 21.72 cents; and the Missouri Pacific Railroad Company, 27.70 cents. The appellants' argument is that these are system figures, but there is no reason why these figures should not be accepted as evidence of cost of handling freight traffic. Certainly, rates that show such yield of revenue per car-mile must be, and are, compensatory.

With reference to the fact that the proposed rates on heavier oils will be more than 1½ cents per 100 pounds below truck rates on the same commodities, this creates no basis for objection to the permission granted. We have previously, in our decision in the companion

case, discussed this issue. The fact that the proposed rates are from Kaneb to only 103 Nebraska stations instead of to all stations furnishes no basis for proper objection. As heretofore stated, if shippers request rates to other stations in Nebraska in addition to the 103 stations referred to, the appellees undoubtedly will request permission to establish similar rates to other stations.

We find no evidence in the instant case of unjust discrimination or undue prejudice, and we cannot assume such to be existent. In any event, the rates authorized by the commission are subject in the future to the right of any one claiming unjust or unlawful discrimination or undue prejudice to complain to the commission and present evidence in support thereof.

With reference to other decisions cited by the appellants on the basis of which they argue that because the Interstate Commerce Commission has refused to allow rail carriers a differential of 1½ cents per 100 pounds in other areas, as indicated by the decisions cited by the appellants, or similar differentials in other commodities, the question of whether such a differential should be allowed in Nebraska or in the area tributary thereto is open for determination.

We have heretofore referred to I. & S. docket No. 5853, 289 I.C.C. 457, which refers to this area. This decision of the Interstate Commerce Commission was sustained by the federal courts in Ward Transport v. United States, 125 F. Supp. 363, affirmed in 348 U. S. 979, 75 S. Ct. 570, 99 L. Ed. 762, following which the appellees filed tariff 448 with the Interstate Commerce Commission naming interstate rates to and between stations in Nebraska constructed in accordance with the formula prescribed in I. & S. docket No. 5853, and the Interstate Commerce Commission allowed tariff 448 to go into effect December 1, 1955, as published. Other cases relating to other areas are not important or material in the instant case until the Interstate Commerce

Commission reverses its decision in I. & S. docket No. 5853 and prescribes some other formula to be followed.

We conclude that the order appealed from is valid and within the authority of the commission, is not arbitrary or unreasonable, and should be and is affirmed.

AFFIRMED.

MINNIE NELSON ET AL., APPELLEES, V. CHRIS RASMUSSEN ET AL., APPELLANTS, IMPLEADED WITH MARTHA RASMUSSEN ET AL., APPELLEES.

82 N. W. 2d 418

Filed April 12, 1957. No. 34154.

1. **Wills.** A will, made and left in the custody of the testator, that cannot be found after his death is presumed to have been destroyed by him with the intention of revoking it.
2. **Judgments.** A determination by the proper county court in a proceeding brought and prosecuted therein in accordance with sections 30-1701 to 30-1704, R. R. S. 1943, that the deceased died more than 2 years before the filing of the petition, that he died intestate, and that named persons are his heirs is, after it becomes final, binding and conclusive on all persons.
3. **Banks and Banking.** Section 8-167, R. R. S. 1943, was intended for the protection of banks but it also establishes the property rights of the persons described therein unless the contrary is expressed by the terms of the deposit.
4. **Banks and Banking: Joint Tenancy.** If a deposit is made in a bank payable to two persons, either expressly as joint tenants with right of survivorship or without those or similar qualifying words, upon the death of one of the co-owners of the deposit it becomes the sole property of and is payable to the surviving co-owner.
5. **Banks and Banking: Trusts.** A joint deposit in a bank in the name of two persons is not, upon the death of one of them, conclusive of the ownership of the deposit by the surviving co-owner as between him and a third person who claims that the surviving owner holds the legal title to the deposit in trust for the third party.
6. **United States: Contracts.** A United States savings bond is a contract between the federal government and the purchaser, and Treasury Department regulations governing such bonds are in-

corporated into the contract by reference and are beyond the reach of state law to modify or destroy.

7. ———: ———. If a United States savings bond is registered in the names of two persons as co-owners, the rights of the surviving co-owner arise solely by contract.

8. ———: ———. A surviving co-owner of a United States savings bond takes title thereto as sole owner by reason of Treasury Department regulations incorporated in the contract between the federal government and the purchaser of the bond.

9. Trusts. If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title.

10. ———. The burden of establishing a constructive trust is always upon the person who bases his rights thereon and he must do so by evidence that is clear, satisfactory, and convincing.

APPEAL from the district court for Dakota County: ALFRED D. RAUN, JUDGE. *Reversed and remanded with directions.*

P. F. Verzani and *Mark J. Ryan,* for appellants.

Warner & Shokes and *Free & Free,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Appellees seek a determination in this cause that a designated bank deposit and described United States savings bonds were the property of Martha Rasmussen at the time of her death and that Chris Rasmussen be required to account for the deposit and the bonds or the proceeds of and income from them to the representative of the estate of Martha Rasmussen. The judgment of the district court was favorable to appellees. It is presented to this court for review by an appeal.

Chris M. Rasmussen, a resident of Dakota County and the owner of the real estate described in the petition in this case, died intestate December 9, 1939. He was

survived by Martha Rasmussen, his widow; Hans Rasmussen, Axel Rasmussen, Rasmus Rasmussen, Walter Rasmussen, and Chris Rasmussen, his sons; and Minnie Nelson, Elizabeth Hansen, Sena Jensen, and Ella Jepsen, his daughters. Ordinary administration of the estate of the deceased was not had but a limited and circumscribed administration thereof was commenced in the county court of that county more than 2 years after the death of the deceased and it was prosecuted to a conclusion as authorized by the statutes of this state. §§ 30-1701 to 30-1704, R. R. S. 1943. The court on March 25, 1950, found therein the facts required as a prerequisite of the validity of such a proceeding; that deceased was the owner of the real estate referred to above; that the widow, the sons, and the daughters of the deceased were his heirs; and that the real estate descended to the widow one-third thereof and to each of the children two twenty-sevenths thereof.

Hans Rasmussen, a resident of Harris County, Texas, died April 16, 1947, survived by Martha Rasmussen, his widow; Russell Rasmussen, his son; and Robinette Qualls, his daughter. It was found and adjudged by the county court of Dakota County on March 25, 1950, in proceedings duly brought and prosecuted therein, as provided by law, that the widow and children of the deceased were his heirs and that the interest of the deceased in the real estate descended to them an undivided one-third thereof to each. The decrees of March 25, 1950, in the matter of the estate of Chris M. Rasmussen, deceased, and in the matter of the estate of Hans Rasmussen, deceased, each became final as rendered.

Martha Rasmussen, the widow of Chris M. Rasmussen, died intestate May 2, 1952, a resident of Dakota County. She was the mother of the children of Chris M. Rasmussen. They survived her except Hans Rasmussen. His widow and children survived his mother. Mark J. Ryan was appointed, qualified as, and is administrator of the estate of Martha Rasmussen, deceased, by pro-

ceedings duly instituted and now pending in the county court of Dakota County.

The real estate in South Sioux City was the homestead of Chris M. Rasmussen and his wife, Martha Rasmussen, from 1938 until the death of the former. The widow occupied and used it as her home until her death. She leased and collected the rents from, paid the taxes on, and the maintenance expenses of, the three farms owned by her husband when he died from the time of his death until her death. The term deceased will be used to designate Martha Rasmussen, widow of Chris M. Rasmussen, except when she is described as mother or by her name. The term appellant or Chris will be employed to identify Chris Rasmussen, the youngest son of the deceased, sometimes named as Chris M. Rasmussen, and who is one of the appellants.

The real estate owned by Chris M. Rasmussen at the time of his death, except that in South Sioux City, was sold and conveyed by his heirs, except Hans Rasmussen, and by the heirs of Hans Rasmussen, deceased. The respective spouses of the grantors who were married joined in the deeds. Walter Rasmussen was the purchaser of 160 acres of the land; Jorgen F. Nelson, husband of Minnie Nelson, bought 80 acres of the land; and Rasmus Rasmussen became the owner of the remaining 160 acres of the land. The net proceeds of the sale of the land were paid to, received, and have since been retained by the owners of it in the proportion of the ownership of each. The possession of the land was surrendered to the purchasers when the sale thereof was completed.

The net share of the deceased was $17,697.59. A deposit of $5,600 was made in her account subject to check in the Nebraska State Bank of South Sioux City which account she had maintained therein since April 4, 1944. On or about May 23, 1950, $12,000 was invested by Martha Rasmussen in United States savings bonds, series G, and they were registered in the name of and

made payable to Martha Rasmussen or Chris Rasmussen.

Chris M. Rasmussen, his wife, and appellant lived on a part of the land the father owned until the year 1938. They moved to South Sioux City at that time and lived there until the death of the father in the year 1939. Thereafter Chris and his mother occupied the family home until the death of the mother in 1952. Martha Rasmussen, the deceased, rented the land her husband owned when he died. The rental for two of the farms was cash and the rental of the other was a share of the crops raised thereon. The rentals were received or collected by the deceased until the time of her death. She paid the taxes on the real estate. Matters concerning the home were conducted by the deceased and her son Chris until her health became impaired. Thereafter her daughters and daughters-in-law were in the home frequently and assisted in the care of the deceased and the home on week days and Chris did this at night and on Sunday. He was unmarried and lived at home as he had always done. He was 49 years of age in 1956. A sister of Chris who lived near the home of her mother testified she had always visited her mother quite often—about once or twice a week. She testified that she had no personal knowledge that Chris transacted any business for her mother. She did say that when her mother was sick Chris got groceries and if there were taxes that had to be paid he paid them. Another sister testified that her mother talked about business with and sought advice from Chris with respect to business affairs. She gave no facts to support this conclusion except she said if her mother had money to deposit sometimes Chris did it and sometimes her mother did it herself, and that when her mother was sick Chris wrote checks on her account. She did not say what the checks were for or to whom they were payable. Appellant said that the only checks he wrote on his mother's account were for groceries and in this respect he was without direct challenge. He did make

deposits in the account of his mother in the bank when she was not going to the bank and he was. There was testimony to the effect that a person had seen the deceased in the bank on a few occasions after about January 1, 1949, but he could not specify when. His recollection was that Chris was with his mother at these times.

The deceased, a native of Denmark, came to the United States when she was about 23 years of age. She did not attend school in the United States. Her use of the English language was limited to usual matters experienced by persons of like situation. She did not understand uncommon, difficult, or unusual words expressed in English. She read and understood the county paper and a daily paper published in English. She generally had read the paper before Chris came home from his work and she would tell him when he arrived home of things she had read. She often discussed news items and events which she had read in the papers. She did this until near the end of her life. The deceased was not as robust physically commencing about 1938 as she had been previously. Her hearing and eyesight were impaired to some extent. She required glasses for reading purposes and she had a hearing aid. In order for her to hear during a conversation it was necessary that the speaker talk somewhat louder than was required in earlier times. It was thought that probably her eyes were affected by cataracts.

In July 1949 she had a heart attack. Chris came home at noon from his farm work and found her ill, lying on the davenport in the home. He summoned a doctor. The doctor attended her for a considerable time thereafter. The sisters and sisters-in-law of Chris came to the home and different ones of them stayed at different times with and assisted the deceased during the day while Chris was away at his work. They did this during work days and Chris took care of his mother and the home at night and on Sunday. The deceased spent

more than half of the time in bed for a considerable time after the heart attack. She was up and down at irregular intervals. She gave evidence after the heart attack of being more easily disturbed and she cried at times when the cause of it was not easily discernible. She did not recover her previous normal physical health but it was not much different than it had been for a year or so previous to her illness. There is testimony that she would be in bed one day and up the next and out in the garden with her flowers. She did things about the house. There were times when she was left alone in the home entirely unattended. She went downtown and to the bank a few times by herself after her illness in 1949. Generally she was accompanied by someone and usually Chris took her.

The husband of the deceased generally attended to business matters until his death and thereafter she usually transacted the business matters in which she was interested until the time of her death. The proof is that until her last illness she recognized persons she had known when she came in contact with them, including members of her family; that she was aware of what property she had; that she knew the facts of her bank account; that she realized what she wanted to do or have done with her property; and that she knew the meaning and effect of what she did, with the possible exception that in 1949 during her illness when she thought her dissolution might be near she exhibited unnecessary and unwarranted anxiety concerning the existence of sufficient funds to pay expenses that would accrue incident to her transition from life to death. There is no evidence that she had any mental deficiency. In this respect she was as mentally sound, alert, and keen of comprehension as would be expected of a normal person her age. She had passed her 83rd year of life at the time of her death.

The deceased was a patron of the Nebraska State Bank of South Sioux City commencing with April 4,

1944, and continuously until the time of her death. The signature card originally furnished by her to the bank incident to her account, identifying the persons authorized to sign checks on it, was signed on the face or front side of the card by Martha Rassmussen and Chris M. Rasmussen. It was shown that the name Chris Rasmussen and Chris M. Rasmussen in this respect related to and identified the same person. At a later date, not established by the record of the bank or known to its officer who testified but probably after September 1946, the joint account agreement printed on the back of the signature card was signed by Martha Rasmussen and Chris Rasmussen using the name of Chris M. Rasmussen.

A daughter of the deceased, one of the appellees, testified that in July 1949, after the deceased had difficulty with her heart, when she was very sick and thought she was going to die, she asked appellant to go to the bank and draw all her money out of it so that there would be money to bury her. He told his mother that he did not want her money but about 11 a. m. of that day he left the house and later returned to the home with two signature cards. He had one "making himself a survivor on her account." He had another and he told his mother "if she would sign them then she could get his money if he died first." She signed the card with respect to her account and the other card he had brought with him when he returned. Appellant returned the card concerning her account to the bank. The witness said the doctor called on her mother that morning and he administered medication to her by hypo before the conversation about the bank account. She said such treatment caused her mother to lose awareness of her environment and usually she went to sleep after she submitted to a hypo. How long it was before the conversation that the hypo was administered or what was administered to the patient does not appear. The deceased said nothing to her daughter then or

later about her bank account. Likewise the daughter had no part in the conversation and made no protest or objection to what was done. She did not say that her mother did not appear and act rational or that she did not act with full knowledge and understanding of what she did. The witness does not claim that she made any effort to find out from her mother then or later if she was aware of what she had done and if her act in that regard and the effect of it was what she desired, notwithstanding the fact that the witness said she spent about one-third of her time with her mother from then until her death and her mother lived for about 3 years afterward. The witness did testify that she did not mean to be understood that she thought at that time that her brother Chris was trying to take advantage of her mother.

Appellant, when he was asked if he remembered when he took the signature card in reference to the account of his mother from the bank to his home so that she could sign it, answered that he did, vaguely. She was quite sick and she became anxious about the signature card she had given the bank as one of its customers. The bank had changed hands some time before. She worried about whether there would be money available to bury her. She did not ask him to withdraw her money from the bank for this purpose. She asked appellant to go to the bank and get a signature card "or to see if it was still available at the bank that way." He went to the bank and talked to the cashier about the signature card, and the cashier said there was a card there but "to make sure you just sign another one here and take down there and have her sign it." Appellant got the signature card from the bank and took it home. The joint agreement on the card was signed by his mother and by him and he took it back to the bank where it remained, was recognized and acted upon, and was in the bank at the time of the death of deceased. His mother was sick at the time but there was nothing that he heard or saw which indi-

cated she thought she was going to die. She did not say for him to get the money from the bank so there would be money to bury her. He did not testify that it was not said at the time the card was signed in the home that if his mother and appellant signed the joint agreement on the card, the latter could withdraw the money. He testified that he did not suggest that his mother sign the joint agreement; that he did not induce her to do so; and that he never attempted to nor did he ever at any time persuade or influence his mother in any manner or by any means in regard to any business matter or act.

The sister of appellant, who was a witness as above related, testified that when she and appellant were alone in her home on the Gladys George place east of South Sioux City he told her that he had tried to get his mother to make a will but she refused and he said "I can't go any further now." He stated that dad said he could have the house and mother should give it to him. He also said, concerning what he felt he should have from the property of his mother, that one lady gave the house to a son who stayed with her and he thought mother should do the same with him because he had all the work to do. The time of these statements ascribed to appellant is not stated with definiteness but it is indicated that it was probably in June 1950. Appellant denied having made the statements attributed to him by his sister and he said that he never talked with her about his mother making a will. He had no knowledge that she made any attempt to give him the house. She had an interest in the house but she did not own it and any talk about her giving it to him was not only futile but improbable.

The hypothesis of appellees that appellant and his brother, Axel Rasmussen, entered into a conspiracy to induce their mother to consent to and join in a sale of the farm land to get the property in a more accessible form since appellant had been named a joint owner

with his mother of her bank account proceeds from and pursues a false and nonexistent basis. Appellees argue that Chris M. Rasmussen, husband of Martha Rasmussen, made a will devising his wife a life estate in his real estate and devising the remainder to his children equally. They say the evidence of this is uncontradicted. Their petition in this case alleges that none of the appellees ever saw an instrument purporting to be the will of their father. They offered no proof of the contents of such an instrument. A deposition offered to show that the witness and another saw Chris M. Rasmussen sign a paper which he stated was his will and that his signature was attested by the witness and another as subscribing witnesses was excluded upon objection at the trial. There was no offer made that either of the persons knew what the instrument was or what it contained beyond the statement attributed to Chris M. Rasmussen. This was said to have happened about 1937. If there was such an experience, the instrument was shown to be in the possession and control of the alleged testator. It was not found after his death and the presumption is that he destroyed it with the intention of revoking it. Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 110 Am. S. R. 431, 62 L. R. A. 383; In re Estate of Ladman, 128 Neb. 483, 259 N. W. 50; In re Estate of Drake, 150 Neb. 568, 35 N. W. 2d 417.

It was adjudicated March 25, 1950, by the county court of Dakota County in a proceeding in which it had jurisdiction that Chris M. Rasmussen died intestate. Appellees were present at that time in the courtroom, except Minnie Nelson and she had personal knowledge of the proceedings and the time and place of the hearing. The adjudication of the county court that he died intestate became final. This case is an attempted collateral attack on that adjudication. The adjudication of that court bars appellees from contending contrary to it. §§ 30-1701 to 30-1704, R. R. S. 1943; In re Heirship of Robinson, 119 Neb. 285, 228 N. W. 852.

It was testified by Minnie Nelson and Sena Jensen, sisters of appellant, that shortly after the death of their father in 1939 appellant told them there was a will but that there was no use of their doing anything because "it was all left to Mother as long as she lived and then it was to be divided among the children." Appellant denied that he knew anything about a will of his father or the contents of any such an instrument or that he made the alleged statements ascribed to him by his sisters. If appellant told them that their father left a will, then they knew as much about it as appellant did and the alleged conversations took place about 11 years before the hearing in the county court in which it was adjudicated that their father died without a will. The sisters each had actual notice of the time and place of the hearing and what it was for. Sena Jensen was present at the hearing. She made no objection nor did she claim her father left a will. The sisters participated in the sale of the land on the basis that there was no will. Minnie Nelson and her husband bought part of the land and both sisters received and have retained part of the proceeds of the sale which was made and concluded on the basis that there was no life estate affecting it; that the fee title was capable of sale and conveyance; and that it was sold and conveyed. Appellees or any of them made no claim of the existence of a will of their father until this cause was commenced about 14 years after his death and more than 3 years after it had been adjudicated that he died intestate. They may not now be heard to contend that their father did not die intestate. The purpose of this effort was to permit appellees to claim that their mother was duped into consenting to sell the farm land against her will by improper influence exerted upon her and by a conspiracy. This is indicated in the testimony of Sena Jensen, gladly given, that her mother said "that Dad fixed things the way they are supposed to be and that is the way they are going to be." The witness was asked if her mother said anything at that

time about "your father's will." Her answer was that her mother made only the one statement quoted above. Chris M. Rasmussen had not provided anything about the disposition of the property he owned at the time of his death. In the light of this the statement attributed to the deceased is neither intelligible nor significant. Notwithstanding the foregoing, appellees offered evidence of a conversation said to have taken place between the deceased in her home and one of the appellees to the effect that the deceased said she wanted to sell the land. Soon after she and the witness discussed the price of one of the farms. The question was the difference between $65 and $75 per acre. A short period thereafter he called his mother by telephone and told her that he would take the place at $65 per acre. At the first conversation of the son and his mother the appellant was present. He suggested a price of $75 per acre. The land was sold to the other son who had discussed the matter with his mother for $65 per acre. Apparently the mother asserted herself, made the decision, and it prevailed, contrary to the suggestion of appellant.

The record contradicts the claim that the deceased did not desire to sell the land. When the interested parties met in the office of the counsel of the deceased he asked if they were ready to sign the deeds. Rasmus Rasmussen said he was not ready to do so. The deceased inquired of him why he would not take the place. He did not answer but left the office. The deceased then declared if Rasmus does not take the place which it had been contemplated he would purchase, "there isn't anyone going to get any of it." Axel Rasmussen, one of the older sons, then remarked that if Rasmus did not take it, "we will have to put it to a partition sale." Two of the sisters left the office and followed their brother Rasmus. They overtook him and induced him to return to the office. The transaction was completed. He bought the farm and the deeds to the other two farms were

executed by him at the importunity of deceased and his two sisters. Sena Jensen, on cross-examination, said that she was urging the sale of the land in 1950 because she was told that mother had no money to live on. The explanation she gave is of doubtful validity and sincerity because of the previous statement of Walter Rasmussen that his mother was not in need of money and that she had 1,200 bushels of corn in the crib, presumably crop rent from Walter because he farmed the home place on the basis of crop rent, and also because of the anxiety and activity exhibited by Sena Jensen when her brother refused to proceed with the sale and left the office to make sure that the sale of the land would be completed. The demonstration that day by the deceased convincingly disputes the contention that the deceased was actuated by and the victim of undue influence and conspiracy. She appeared very clearly as the controlling and directing person who made the decision, stated the condition, and declared the result unless Rasmus met her terms. She had independent, expert, and experienced assistance available to her but she demonstrated that she could competently decide and speak for herself. The description offered by some of the appellees that she was a whimpering, emotional, and helpless old woman was definitely refuted by her conduct on the occasion just reviewed.

Chris M. Rasmussen died intestate and the land owned by him descended, by operation of law, to his widow, Martha Rasmussen, and his nine children. Any one or more of them could have legally compelled a partition of the land, which would have in all probability resulted in a sale of it because of the nature thereof and the fractional shares of the owners. It was not a conspiracy or undue influence for one or more of the owners to negotiate for and obtain an agreement with the other owners to sell the land which was, in effect, a voluntary partition of it. Any owner had a right to accomplish that result without legal proceedings if pos-

sible and if this could not be done then by the procedure provided by law. The contention that it was undue influence or a conspiracy for appellant and Axel Rasmussen to seek and induce a sale of the land is a fantasy unsupported by fact or law.

The deceased and her heirs, except Minnie Nelson and the heirs of Hans Rasmussen, deceased, were in the county court of Dakota County March 25, 1950, attending the hearing on the petition for determination of the heirs of Chris M. Rasmussen, deceased, and the petition for the determination of the heirs of Hans Rasmussen, deceased. Mark J. Ryan was present as counsel for Martha Rasmussen and conducted the hearings. The owners of the land who were present bound themselves that day by contract to sell the three farms owned by Chris M. Rasmussen at the time of his death. Thereafter, before May 20, 1950, they were present in the office of Mark J. Ryan and executed deeds to the purchasers of the land. The deeds were afterwards executed by the remaining owners.

There is no issue that the land or any part of it did not sell for its fair and reasonable value. The land was conveyed to the purchasers. The purchase price of the land was paid to the owners in the proportion that the ownership of each bore to the net total purchase price. The payments were received, accepted, and have since been retained by the respective owners. Martha Rasmussen received and disposed of one-third of the net proceeds of the sale of the land as has been herein detailed. She was acquainted with Mark J. Ryan, a member of the bar of Nebraska and a former judge for many years of the district court for the district of which Dakota County is a part, and she was represented by him as her attorney at all times from at least March 6, 1950, through May 23, 1950, when all matters concerned with the sale of the land were completed; the money received by Martha Rasmussen had been disposed of; and the bonds in question were purchased and delivered

to her and by her deposited in the joint safety deposit box belonging to her and appellant in the Nebraska State Bank of South Sioux City. Martha Rasmussen had the independent advice and services of her counsel in all those matters.

The daughter of Martha Rasmussen referred to above testified that about a month after the deeds were executed appellant, in the presence and hearing of his mother, said that he had mother's money put in $12,000 worth of bonds; that he had himself made co-owner of the bonds so that as soon as mother was gone they could pay out and not have to go through court again; and that the rest of her money was put in her bank account. Appellant denied that he made the statements. He testified that he had nothing to do with and expressed no opinion or desire to his mother or anyone as to how the money received by her should be disposed of or invested and that he did not know that she had purchased bonds until he saw an interest check that came through the mail which was payable to his mother and to him. Mrs. Rasmussen lived about 2 years after the alleged conversation. The witness said she spent about one-third of her time with her mother. There was no claim that the witness made any inquiry, protest, or objection to her mother or otherwise concerning what she claimed appellant said had been done. The first time any question was expressed or raised, so far as the record is concerned, in reference to any of these matters was more than 3 years after the transactions.

The subject matter of this case consists of two separate and distinct transactions. One involved the bank deposit. It happened in the summer of 1949. The other concerned the United States savings bonds. It occurred in the spring of 1950. The deposit account of $4,778.42 in the Nebraska State Bank of South Sioux City was in the names of Martha Rasmussen or Chris Rasmussen at the time of the death of the former. The deposit as between the bank and the surviving co-owner became

the sole and absolute property of the latter. The bank was not only justified but was legally compelled to permit appellant, as it did do, to withdraw the deposit by his check as his funds after the death of the deceased. The relevant part of section 8-167, R. R. S. 1943, is: "When a deposit in any bank * * * is made in the name of two * * * persons, * * * payable to either or to their survivor * * * such deposit * * * may be * * * paid to either of said persons or to the survivor * * *." The statute was intended for the protection of banks but it also establishes the property rights of the persons described therein unless the contrary appears from the terms of the deposit. If a deposit is made in a bank payable to two persons, either expressly as joint tenants with right of survivorship or without such qualifying words, upon the death of one of the co-owners of the deposit it is payable to the surviving co-owner thereof. In re Estate of Johnson, 116 Neb. 686, 218 N. W. 739; McConnell v. McCook Nat. Bank, 142 Neb. 451, 6 N. W. 2d 599; Rose v. Kahler, 151 Neb. 532, 38 N. W. 2d 391; Scriven v. Scriven, 153 Neb. 655, 45 N. W. 2d 760; DeForge v. Patrick, 162 Neb. 568, 76 N. W. 2d 733.

The form and nature of a joint deposit in the name of two persons in a bank is not, upon the death of one of the co-owners, conclusive as to the ownership of the deposit by the surviving co-owner as between him and a third person who claims that the surviving co-owner holds the legal title to the funds in trust for the third party. In re Estate of Johnson, *supra;* Scriven v. Scriven, *supra.*

If a person occupies a relationship of confidence and trust to another and by untrue statement, wrongful conduct, or concealment of the truth induces or causes the other, a person of extreme age and of some degree of debility, to make or to attempt to make a gift of a material part of his estate to the former which he otherwise would not have done, the imposition is in equity a constructive fraud and the beneficiary thereof will

be determined to hold the legal title to the subject of the gift in trust for the benefactor or his successor.

It is said in Box v. Box, 146 Neb. 826, 21 N. W. 2d 868: "If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title." See, also, Peterson v. Massey, 155 Neb. 829, 53 N. W. 2d 912; Stieber v. Vanderlip, 136 Neb. 862, 287 N. W. 773.

Appellant was requested to consult with the bank and ascertain if the signature card given to it by the deceased at the time she opened her checking account with the bank was in the custody of it and then effective to authorize withdrawal from the deposit account as the signature card evidenced when it was executed and placed in the custody of the bank. The card then authorized funds to be paid from the account on the signature of the deceased or appellant. If that was found to be the status and effect of the signature card when the inquiry was made, she requested appellant to ascertain that information and in that event she expressed no desire or intention to disturb or change it in any respect; but if it was not the situation, then she asked him to get another or new card. He brought her the existing signature card which was then effective as it was originally completed and committed to the custody of the bank. He took it to the deceased and informed her that the official of the bank had said that if she and appellant signed the survivorship agreement exhibited on the back of the card, appellant could withdraw her money from the bank. She had not indicated that she desired to change the deposit to a joint one payable to her and appellant and she was not told that the effect of

her and appellant signing the signature card on the back of it would make it a joint account. The doctrine stated above is, under the circumstances of this case, appropriate, applicable, and controlling as to the proceeds of the bank deposit as it existed at the time of the death of the deceased and was afterwards withdrawn by appellant. It is therefore determined that appellant received and holds the legal title thereto as trustee for the legal representative of the estate of Martha Rasmussen, deceased, and that he should be required forthwith to account therefor and pay to the representative of the estate the amount appellant received from the deposit, the sum of $4,778.42.

Appellant, upon the death of his mother, became the sole owner of the United States savings bonds issued and registered on or about May 23, 1950, in the names of Martha Rasmussen or Chris Rasmussen described in the record of this case as consisting of eight $1,000 bonds and eight $500 bonds. A United States savings bond is a contract between the federal government and the purchaser. Treasury Department regulations governing such bonds are incorporated into such contract by reference and are beyond reach of state law to modify or destroy. If such bonds are issued and registered in the names of two persons as co-owners, the rights of a surviving co-owner arise solely from the contract. The surviving co-owner of the bonds takes title thereto by reason of Treasury Department regulations incorporated in the contract between the government and the purchaser. 31 U. S. C. A., § 757c, p. 622; § 315.45, 31 C. F. R. (1949 Ed.); Rohn v. Kelley, 156 Neb. 463, 56 N. W. 2d 711; United States v. Dauphin Deposit Trust Co., 50 F. Supp. 73; In re Bartlett, 71 F. Supp. 514; Annotations, 168 A. L. R. 245, 173 A. L. R. 550. The record does not impeach the ownership of the bonds by appellant or his right to or enjoyment of the proceeds of them. The proof is insufficient to establish that he had any part in the purchase of the bonds or that he in any way at-

tempted to induce or influence the deceased to purchase them or have them issued and registered in the names of Martha Rasmussen or Chris Rasmussen. Martha Rasmussen had independent advice and assistance of counsel in all matters in which she was interested in the sale of the land, the disposition of the funds she received from the proceeds of the sale, and in the purchase of the bonds. The principle decisive of this case so far as it concerns the bonds is stated in Peterson v. Massey, *supra,* in this manner: "The burden of establishing a constructive trust is always upon the person who bases his rights thereon and he must do so by evidence that is clear, satisfactory, and convincing." Appellees have not satisfied the burden thus imposed. It is determined that appellant is the owner of the bonds and all interest or other accruals to them by absolute title and he is entitled to the unconditional possession of them. The bonds are in the custody of Mark J. Ryan as the representative of the estate of Martha Rasmussen, deceased, awaiting the determination of this cause, and he should be directed and ordered to forthwith surrender and deliver the bonds to appellant without condition.

Appellants contest the compensation made counsel for appellees who were plaintiffs for their services rendered in this case. After the judgment was rendered by the district court, counsel for appellees filed an application for allowance of attorneys' fees which is, in substance, the following: They commenced and prosecuted this case for appellees in which it was adjudged that Chris Rasmussen, one of the appellants, should pay to the representative of the estate of Martha Rasmussen, deceased, $4,778.42 and legal interest from May 2, 1952, and deliver to said representative United States savings bonds of the value of $12,000 and interest accrued thereon from November 1, 1952; and that the judgment was for the benefit of all the heirs of the deceased. There were heirs of the deceased who did not

join appellees in the prosecution of the case. The attorneys contracted with appellees for a contingent fee or compensation of one-third of all amounts recovered by the action, which was a reasonable amount. They asked an order requiring the representative of said estate to pay one-third of the amount of the judgment to the attorneys for appellees on account of their services rendered in the case in protecting and preserving said funds for the benefit of all of the heirs of the deceased.

The application was verified on belief. The record fails to show that any evidence was offered in support of it. It was submitted to the court on the day it was filed. Later the district court entered an order "that the application of plaintiffs' attorneys of the allowance of attorneys' fees should be and it is allowed in the amount of twenty-five percent of the judgment entered on June 4, 1956," which is the judgment above referred to. The motion of appellants for a new trial was denied on the day the order allowing fees was entered.

In Linn v. Linn, 146 Neb. 666, 21 N. W. 2d 283, it is said: "Where the services of a litigant's attorney result in rescuing or preserving property or funds, not only for the benefit of the particular litigant but for the benefit of all others in the same class, the court may in the exercise of a sound legal discretion order a reasonable fee to be paid to such attorney from the common fund or by those benefited by it." The opinion in that case contains the following: "It must appear from the record that all in the class benefited from the action of the one making the claim." See, also, Allen v. City of Omaha, 136 Neb. 620, 286 N. W. 916; State ex rel. Ebke v. Board of Educational Lands & Funds, 159 Neb. 79, 65 N. W. 2d 392.

Obviously the class referred to in the present action was the heirs of Martha Rasmussen, deceased. Chris Rasmussen was one of her heirs and he was not and could not be benefited by this action because the object

and purpose of it was to recover from him, that is, take something from him and not to contribute anything to him.

The judgment of the trial court rendered in the case had not become final and the litigation had not yet terminated at the time of the order allowing attorneys' fees. The order of the district court allowing attorneys' fees is also inappropriate because of the conclusions expressed herein concerning the merits and disposition of the case. The order cannot be sustained. There is neither statutory authority nor uniform course of procedure to justify the allowance of compensation to the attorneys for appellees in the circumstances of this case. State ex rel. Ebke v. Board of Educational Lands & Funds, *supra*.

The judgment and the order allowing attorneys' fees to the counsel for appellees should be and they each are reversed and the cause is remanded to the district court for Dakota County with directions to render and enter in this cause a judgment as follows:

1. Requiring Chris Rasmussen, one of the appellants, to account for and pay forthwith to Mark J. Ryan as administrator of the estate of Martha Rasmussen, deceased, the sum of $4,778.42 with interest thereon at 6 percent per annum from May 2, 1952.

2. Adjudicating that Chris Rasmussen is the owner and entitled to the possession of the United States savings bonds, series G, in the principal sum of $12,000 purchased by Martha Rasmussen in her lifetime and issued and registered in the names of Martha Rasmussen or Chris Rasmussen and fully described in the record of this case, and the interest accruing thereon from May 2, 1952; and that Chris Rasmussen is entitled to collect, receive, retain, and use as his absolute property the proceeds of said bonds.

3. That Mark J. Ryan, one of the appellants, who has the custody of the bonds, is required forthwith to

surrender and deliver the bonds without condition to Chris Rasmussen.

REVERSED AND REMANDED WITH DIRECTIONS.

HAROLD GRIGGS, APPELLEE, V. MAE OAK ET AL., APPELLANTS.
MAE OAK, APPELLANT, V. HAROLD GRIGGS, APPELLEE.
82 N. W. 2d 410

Filed April 12, 1957. No. 34159.

1. **Frauds, Statute of: Specific Performance.** An oral contract partly performed, which the statute of frauds requires to be in writing, will be enforced by a court of equity.
2. ———: ———. Under this rule the burden is upon the plaintiff to prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract.
3. **Contracts.** To establish an express contract there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof.
4. ———. The acceptance of an offer must be an unconditional acceptance of the offer as made, otherwise no contract is formed. There must be no substantial variation between the offer and the acceptance. If the acceptance differs from the offer or is coupled with any condition that varies or adds to the offer, it is not an acceptance, but is a counterproposition.
5. ———. Where one, to whom an offer is made, makes a counterproposition of different terms and new conditions, such counterproposition amounts to a rejection of the offer.

APPEAL from the district court for Dixon County: ALFRED D. RAUN, JUDGE. *Reversed and remanded with directions.*

Max Marshall, for appellants.

Kenneth M. Olds, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for Dixon County. It involves two separate actions filed in that court which were consolidated for the purpose of trial and appeal. The first action, instituted on August 20, 1955, by Harold Griggs against Mae Oak and her husband, Clifford J. Oak, seeks to have specifically performed an alleged oral agreement with Mae Oak to give him a 3-year lease on two certain unimproved lots located in Wakefield, Nebraska, owned by her and described as Lots 6 and 7, Block 2, Anderson's Addition to the Village of Wakefield, Dixon County, Nebraska. The second action, instituted on August 24, 1955, by Mae Oak against Harold E. Griggs, who is the same person who, as Harold Griggs, instituted the first action, seeks to have the defendant therein ejected from these same premises; to recover from him all damages he caused thereto and to a crop of alfalfa hay growing thereon; to recover for the use of the property; and to enjoin him from removing any improvements that he has placed thereon.

Harold Griggs died on March 21, 1956, and thereafter both actions were revived in the name of Geneva Griggs, as administratrix of his estate. For convenience we shall hereinafter refer to decedent as Griggs.

On July 26, 1956, the trial court decreed specific performance of the alleged oral lease for the 3-year period claimed by Griggs in the action he instituted, being from June 4, 1955, to June 4, 1958, and dismissed the action of ejectment instituted by Mae Oak. Mae Oak filed a motion for new trial in both actions and, from the overruling thereof, appeal was taken to this court.

The record shows the parties waived a jury trial and therefore appellee claims the trial court's findings have the same effect as a verdict of a jury. An action for specific performance is one in equity. Mainelli v. Neuhaus, 157 Neb. 392, 59 N. W. 2d 607; Bauer v. Bauer,

136 Neb. 329, 285 N. W. 565. Consequently we will consider the record de novo as it relates thereto. On the other hand an action in ejectment is one in law. Abbas v. Demont, 152 Neb. 77, 40 N. W. 2d 265. Consequently the court's findings as they relate thereto will not be set aside unless clearly wrong. Farmers Union Fidelity Ins. Co. v. Farmers Union Co-Op. Ins. Co., 147 Neb. 1093, 26 N. W. 2d 122.

The first question presented is, was there a contract entered into between the parties for a 3-year lease?

The record shows appellant Mae Oak, whom we shall hereinafter refer to as Mrs. Oak, owned the lots hereinbefore described. She, with her husband, Clifford J., resided in Gardena, California. By letter dated May 19, 1952, Mrs. Oak advised Walter L. Moller, an insurance and real estate agent in Wakefield, Nebraska, that she was very anxious to sell the lots she owned in Wakefield and any arrangements which her father, Wilber Evans, made with him in regard thereto would be satisfactory with her. Her father lived in Wakefield. The evidence shows the father contacted Moller on several occasions for the purpose of getting him to try to find a buyer. Moller endeavered to do so and, in his endeavors, contacted Griggs. Although interested in buying the property Griggs advised Moller he could not finance the purchase thereof but would be interested in leasing it. Griggs suggested to Moller a rental of $75 per year and a lease covering more than 1 year.

On June 3, 1955, Moller called Mrs. Oak on the telephone at her home in Gardena, California, and informed her of his opportunity to lease her lots, asking if she was interested in doing so. Mrs. Oak, in her conversation with Moller, authorized him to lease her lots for a period of 1 year at a rental of $100, payable in equal semiannual installments, that is, he was to write up a lease to that effect and mail it to her. Moller immediately advised Griggs thereof but no lease for 1 year was ever prepared. However, on or before June 4, 1955, Griggs

apparently went into possession of the lots and started to make the necessary improvements thereon for a trailer court. The improvements included piping in water and gas, laying sewer lines, putting in wiring for electricity, and building a utility building. This is evidenced by the statements of Harry H. Cruickshank and Lee Swinney. In fact Swinney states his books show that on June 4, 1955, Griggs gave him a check in the amount of $87.25 for 349 feet of waterline trench he had dug.

On June 7, 1955, Griggs told Moller the improvements he was planning to make on the property would cost more than he had anticipated and, on the basis of a 1-year lease, did not think he could get his money back. In view thereof he asked Moller to call Mrs. Oak and attempt to get a lease for 5 years. That evening Moller called Mrs. Oak on the telephone at her home in California and advised her of the foregoing. On the basis thereof he attempted to negotiate a 5-year lease, but failed. He did, however, get her to give him authority to enter into a 3-year lease on the same annual rental terms, Mrs. Oak telling him to prepare and send out such a lease. Moller prepared such a lease, running from June 4, 1955, to June 4, 1958, at an annual rental of $100 payable semiannually but, at the insistence of Griggs, put the following option therein: "AND IT IS FURTHER AGREED, That the party of the first part grants unto the party of the second part an Option to Purchase the above described property at the expiration of the lease for the price of $1,000.00 plus any paving assessments not yet due on the said property, and that any rents which have been paid by the party of the second part to the party of the first part shall be applied toward the purchase price of the property."

By letter dated June 8, 1955, which Mrs. Oak acknowledged receiving, Moller sent her 2 copies of this lease signed by Griggs together with Griggs' check for $50 covering the first semiannual payment of rent. Mrs. Oak replied to this letter on June 11, 1955, advising

Moller the lease, with the option clause, was unacceptable and returned the lease and check. However, therein she advised Moller that: "* * * if the lease is written for a term of three years at $100.00 per year a clause to this effect must be inserted: that the party of the second part agrees to expend not less than $250.00 in connecting with sewer and erecting a utility building which shall be left on the property at expiration of the lease; with no option whatsoever." Moller acknowledged receiving this letter about June 13, 1955, and advising Griggs thereof. However, no lease was ever prepared containing this provision. Griggs continued to remain in possession of the property and continued with the improvemnts he was making thereon.

Meanwhile Griggs apparently found a way whereby he could finance the purchase of the property for he had Moller try to negotiate a purchase thereof. Moller called Mrs. Oak on the telephone for this purpose on June 15, 1955. She, at that time, informed Moller she was no longer agreeable to either a sale or lease of the premises or to anything else. Moller then advised Mrs. Oak of the improvements Griggs had placed on her property.

A few minutes after this call by Moller on June 15, 1955, Griggs called Mrs. Oak and tried to persuade her to sign a lease, which she refused, saying she was not going to do business with him. He then told her of the improvements he had put on her property. She advised him not to do anything further on the property. Thereafter, on June 17, 1955, Harry N. Larson, a lawyer at Wakefield, wrote Mrs. Oak on behalf of Griggs trying to buy her property, which offer she rejected.

During these negotiations, and for some time thereafter as is evidenced by the bills and statements for material and labor, Griggs continued to improve this property, putting in the improvements already referred to at a total cost of over $1,000.

Section 36-105, R. R. S. 1943, provides: "Every con-

tract for the leasing for a longer period than one year, or for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made."

In respect to this statute, correspondence between parties, if sufficient, can satisfy the requirements thereof providing the contract shall be void "unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made." See, also, Heenan & Finlen v. Parmele, on rehearing, 80 Neb. 514, 118 N. W. 324.

Also, as stated in Campbell v. Kewanee Finance Co., 133 Neb. 887, 277 N. W. 593: "An oral contract partly performed, which the statute of frauds requires to be in writing, will be enforced by a court of equity." See, also, Sage v. Shaul, 159 Neb. 543, 67 N. W. 2d 921.

"The burden in the light of this rule has devolved upon the plaintiff to prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract." Peterson v. Peterson, 158 Neb. 551, 63 N. W. 2d 858. See, also, Crnkovich v. Crnkovich, 144 Neb. 904, 15 N. W. 2d 66; Caspers v. Frerichs, 146 Neb. 740, 21 N. W. 2d 513; Lunkwitz v. Guffey, 150 Neb. 247, 34 N. W. 2d 256.

It is well settled by these and other decisions of this court that before there can be specific performance of an oral contract coming under this statute, because of acts constituting performance, the contract itself must be proved.

"To establish an express contract there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof." Melick v. Kelley, 53 Neb. 509, 73 N. W. 945. See, also, Beskas v. Calkins, 135 Neb. 323, 281 N. W. 29; Farmers Union

Fidelity Ins. Co. v. Farmers Union Co-Op. Ins. Co., *supra;* Standard Oil Co. v. O'Hare, 126 Neb. 11, 252 N. W. 398.

"The acceptance of an offer * * * must be an unconditional acceptance of the offer as made; otherwise no contract is formed. There must be no substantial variation between the offer and the acceptance. If the acceptance differs from the offer or is coupled with any condition that varies or adds to the offer, it is not an acceptance, but is a counterproposition." Anderson v. Stewart, 149 Neb. 660, 32 N. W. 2d 140, 3 A. L. R. 2d 250.

"Where one, to whom an offer is made, makes a counterproposition of different terms and new conditions, such counterproposition amounts to a rejection of the offer." Farmers Union Fidelity Ins. Co. v. Farmers Union Co-Op. Ins. Co., *supra.*

However, an acceptance can be shown by conduct or by performance communicated to the promisor. Siebring Mfg. Co. v. Carlson Hybrid Corn Co., 246 Iowa 923, 70 N. W. 2d 149; Johnson v. M. J. O'Neil, Inc., 182 Minn. 232, 234 N. W. 16. But such would not be effective if the offer sought to be performed was, in fact, rejected.

The record shows the first offer made by Mrs. Oak to Griggs was for a 1-year lease. Although Griggs went into possession and started to make improvements on the property immediately thereafter it is self evident he did not accept this offer for he does not here seek to obtain a lease for 1 year. In fact, when he discovered what the improvements for a trailer court would cost, he asked Moller to negotiate for a longer lease. This Moller did, obtaining from Mrs. Oak an offer of a 3-year lease with the terms of an annual rental of $100 payable in semiannual installments. This is apparently the offer appellee is here seeking to have specifically enforced. However Griggs rejected this offer when he insisted that the lease contain the option herein-

before set forth. Mrs. Oak rejected this counterproposal by Griggs but again offered to lease the property for 3 years but in this offer included the provisions hereinbefore set forth from her letter of June 11, 1955. Griggs never accepted this offer and, in fact, rejected it when, on June 15, 1955, he had Moller attempt to negotiate a purchase of the property. At that time Mrs. Oak withdrew all offers to lease the property, which she had a right to do, as none of them had been unconditionally accepted. We do not think the correspondence is such that it creates a contract between the parties leasing the property to Griggs. Neither do we think Griggs accepted Mrs. Oak's offer for a 3-year lease or any other offer to lease. In fact, we think the record discloses he rejected all offers and he, and his successors, have, at all times, been occupying the property of Mrs. Oak without any right to do so. In view of this finding we think the trial court was clearly wrong in denying to Mrs. Oak, in her action, some of the relief she prayed for therein. We think she is entitled to the immediate possession of her property and to have appellee enjoined from removing any of the improvements that have been placed thereon, including those placed thereon in either April or May 1956. In addition thereto she is entitled to recover for the use of the premises at the rate of $100 per year, which we find is the reasonable value for the use thereof, from June 4, 1955, until she is placed in possession thereof. However, she should be denied any damages for the alleged crop of alfalfa growing thereon in 1955, which she claims was destroyed, or for damages to the lots by reason of a roadway that was placed thereon because the proof adduced in relation thereto was insufficient upon which to base the allowance of any damages for either of these items.

We reverse the judgments of the trial court in both actions and remand the causes with directions to it to enter a proper decree in each in accordance with our

holding and directions herein set forth. All costs are to be taxed to appellee in both cases.

REVERSED AND REMANDED WITH DIRECTIONS.

CAPITAL BRIDGE COMPANY, A CORPORATION, DOING BUSINESS AS CENTURY BRIDGE LUMBER COMPANY, APPELLEE, V. COUNTY OF SAUNDERS, APPELLEE, GLENN MELSON, A TAXPAYER, APPELLANT.

83 N. W. 2d 18

Filed April 19, 1957. No. 34005.

1. **Appeal and Error.** In an action at law where a jury has been waived it is not within the province of this court to resolve conflicts or to weigh evidence. If there is a conflict in the evidence this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong.
2. **Counties: Work and Labor.** Where a statute prohibits a county from making a contract, and avoids the obligation of the contract for so doing, a recovery quantum meruit cannot be had.
3. ———: ———. Where a contract has been entered into in good faith with a county, which contract is within the power of the county to make but is void for the reason that statutory requirements were not complied with, an action in quantum meruit for the service performed or material furnished may be maintained.
4. ———: ———. The right to recover in quantum meruit for service performed or material furnished under a void contract with a county exists up to the limit of, and not beyond, that which would have been recoverable under a valid contract covering the same subject matter.
5. **Counties.** Under the provisions of section 23-336, R. R. S. 1943, the obligation of a contract is void where the contract is contrary to a statutory limitation, or where there are no funds legally available at the time with which to pay the obligation, or in the absence of a statute expressly authorizing such contract. It has no application where the county has general authority to make the contract but the power has been irregularly exercised.

APPEAL from the district court for Saunders County: HARRY D. LANDIS, JUDGE. *Affirmed.*

Myrl D. Edstrom, for appellant.

Howard V. Kanouff, Woods, Aitken & Aitken, and *George W. Haessler,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an appeal from a judgment for the plaintiff against the county of Saunders for $4,832 for bridge lumber sold to the county. The appeal was taken by a taxpayer who alleges that the lumber was delivered as the result of two orders each of which was in excess of $500 and therefore contrary to the provisions of section 39-810, R. R. S. 1943, which requires purchases in excess of $500 to be let to the lowest responsible bidder.

The amended petition of the plaintiff sets forth 11 causes of action, each based on a separate order for bridge lumber. Each cause of action is similar except for the order date and the amount claimed as the fair and reasonable value of the lumber furnished. The dates and amounts set out in the 11 causes of action are as follows: May 27, 1943, $483.60; June 4, 1954, $485.69; June 7, 1954, $496.01; June 11, 1954, $489.60; June 14, 1954, $464.10; June 18, 1954, $497.76; June 21, 1954, $448.80; June 25, 1954, $485.34; June 28, 1954, $328.32; June 30, 1954, $326.39; and July 2, 1954, $326.39. The plaintiff prayed for judgment in the amount of $4,832 with interest and costs.

The answer filed by the taxpayer alleges that the board of supervisors did not enter into a contract to purchase the bridge lumber for the value of which suit was brought. It alleges further that the lumber was purchased by William Stewart, the highway commissioner of Saunders County, without the knowledge, consent, authority, or direction of the board of supervisors. The taxpayer further alleges that if lumber was delivered to the county it was pursuant to two orders made

by Stewart, each of which was in excess of the amount that could be purchased without advertising for the lowest responsible bidder, and that plaintiff and Stewart deliberately and intentionally represented to the defendant that the 2 orders were 11 separate and distinct purchases to show that such purchases were each in a sum less than $500.

The reply of the plaintiff alleges that Stewart was authorized by the county supervisors to purchase lumber when required or needed in amounts less than $500. Plaintiff further alleges that plaintiff's agent and salesman had been present at regular meetings of the board when Stewart was authorized to make purchases of lumber, that the board of supervisors had paid previous claims for lumber ordered by Stewart, and that the county was estopped to deny liability because of a want of authority on the part of Stewart. Plaintiff alleges also that the amount claimed is less than the reasonable value of the lumber delivered.

Upon the issues thus made, the case was tried by the court, a jury trial having been waived by the parties. The trial court found for the plaintiff in the amount of $4,832 with interest at six percent per annum from September 12, 1954, a total sum of $5,141.50 on the day of judgment.

The action is one at law in which a jury was waived and a trial had to the court. Under such circumstances the findings of the trial court are equivalent to the verdict of a jury. The evidence must therefore be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in plaintiff's favor and it should have the benefit of every inference that can reasonably be deduced therefrom. Wallace v. Insurance Co. of North America, 162 Neb. 172, 75 N. W. 2d 549; Barnes v. Davitt, 160 Neb. 595, 71 N. W. 2d 107.

The evidence sustains the following findings of fact: From May 27, 1954, to July 2, 1954, the plaintiff re-

ceived 11 separate orders for bridge lumber on 11 different days as hereinbefore recited. The orders were signed by Stewart, the highway commissioner for Saunders County, who was orally instructed by the board of supervisors to make purchases for bridge lumber required, but not in excess of $500 at any one time. The evidence shows without dispute that the lumber in question was delivered, retained, and used by the county. All budgetary requirements had been complied with by the board of supervisors and the county had adequate funds on hand and available to pay for the lumber for which the suit was brought.

The basis of the contention of the taxpayer that there were but two orders each in excess of $500 is grounded upon the following factual situation: The first eight invoices bear plaintiff's order No. 1244, and the last three invoices bear plaintiff's order No. 1227. The president of the plaintiff company testifies that it is the bookkeeping practice of the company to give all the orders received from a customer the same order number until all ordered materials have been delivered. After the delivery of all materials on all past orders has been made, the next order received is given a new order number. The method of bookkeeping was fully explained and is shown to be a bookkeeping practice having no relation to the question as to whether or not the customer's orders were in fact one or more separate transactions. The trial court found in effect that there were 11 orders and not 2 under the evidence. Since we are required to give the evidence its most favorable import, the finding of the trial court on this question is conclusive upon this court on appeal.

It is contended that the circumstances surrounding the transactions support a conclusive finding that the orders were made in amounts less than $500 for the fraudulent purpose of circumventing the statute. The evidence does show notations made on orders previously received by the plaintiff from which it might be in-

ferred that some connivance may have existed between the plaintiff and Stewart, the highway commissioner, to avoid the requirements of the statute. These notations, however, were explained in detail by the president of the plaintiff company as informational data for the benefit of plaintiff's clerical employees. The highway commissioner testifies that the county had a continuing need for bridge lumber, that it was hard to get in large quantities because of a threatened strike in the lumber-producing industry, that the price was exceedingly high because of this fact, that the board of supervisors thought it an inopportune time to purchase any considerable quantity of lumber, and that he was directed to buy the lumber as needed in small lots of less than $500 until the market became stabilized and conditions became more normal. He testifies further that he never ordered more than $500 worth of lumber at any one time and that the orders given to plaintiff were for lumber presently needed. He states further that at no time did he ever advise the plaintiff to split orders to keep them under $500 because he never placed an order in excess of that amount. The president of the plaintiff company positively denies that any orders received were in excess of $500 or that any orders were split to make them less than $500. Upon this evidence the trial court found for the plaintiff. We are concluded by the finding of the trial court in favor of the plaintiff on the conflicting evidence as to plaintiff's intent to fraudulently circumvent the statute.

We conclude that the findings of fact made by the trial court which were necessary to sustain a judgment for the plaintiff are sustained by evidence and conclusive upon this court on appeal. It is contended, however, that the evidence is sufficient as a matter of law to show a violation of section 39-810, R. R. S. 1943, and that a recovery of a judgment by the plaintiff is barred for that reason.

The applicable statute states: "The county board

of each county has the power to erect and repair all bridges and approaches thereto and build all culverts and make improvements on roads, the cost and expense of which shall in no instance exceed five hundred dollars. All contracts for the erection or repair of bridges and approaches thereto, for the building of culverts and improvements on roads, the cost and expense of which shall exceed five hundred dollars, shall be let by the county board to the lowest and best bidder. All contracts for materials for repairing, erecting, and constructing bridges and approaches thereto, the cost and expenses of which exceed five hundred dollars, shall be let to the lowest responsible bidder, but the board may reject any and all bids submitted for such materials. Upon rejection of any bid or bids by the board, such board shall have power and authority to purchase materials to repair, erect or construct the bridges of the county, and approaches thereto. * * *." § 39-810, R. R. S. 1943. It is the contention of the appellant that the giving of 11 orders amounting to $4,832 from May 27 through July 2, 1954, by the highway commissioner and their acceptance by the plaintiff is in itself evidence that the county needed lumber in excess of the value of $500 and that, under such circumstances, the statute requires that its purchase should be let to the lowest responsible bidder.

We point out that this statute gives the county board the general power to erect and repair bridges and approaches thereto, build culverts, and make improvements on roads. It is clear therefore that the county board had general authority to purchase bridge lumber for the erection and repair of bridges.

This court has denied recovery in cases where the applicable statute prohibits the making of a contract and avoids the obligation thereof. Village of Bellevue v. Sterba, 140 Neb. 744, 1 N. W. 2d 820; Neisius v. Henry, 142 Neb. 29, 5 N. W. 2d 291; City of Lincoln v. First Nat. Bank, 146 Neb. 221, 19 N. W. 2d 156; Warren v.

County of Stanton, 147 Neb. 32, 22 N. W. 2d 287; Heese v. Wenke, 161 Neb. 311, 73 N. W. 2d 223. In Neisius v. Henry, *supra,* we said: "There is much distinction between a contract with a city which is the result of an illegal exercise of an authorized power and one which is illegal because of a statutory disqualification to make a contract, or to create liability. The former may be ratified or a suit quantum meruit maintained. But where one is prohibited by statute from entering into a contract, and the obligation of the contract avoided for so doing, an action quantum meruit cannot be maintained." This is a correct statement of the law to which we adhere.

But in the present case the statute does not avoid the obligation of a contract made in a manner contrary to the provisions of the statute. In such a situation the rule in this state is: Where a contract has been entered into in good faith by a county, which contract was within the power of the county to make but was void for failure to comply with statutory requirements, an action in quantum meruit for the service performed or the material furnished may be maintained.

In such case the party loses the benefit of his contract and his recovery is limited to the reasonable value of the services performed or the material furnished. O'Neill v. City of South Omaha, 102 Neb. 836, 170 N. W. 174; Stickel Lumber Co. v. City of Kearney, 103 Neb. 636, 173 N. W. 595; Omaha Road Equipment Co. v. Thurston County, 122 Neb. 35, 238 N. W. 919; Western Chemical Co. v. Board of County Commissioners, 130 Neb. 550, 264 N. W. 699; Warren v. County of Stanton, *supra.* We conclude therefore, assuming the correctness of the taxpayer's theory that the statute was not complied with, that the trial court having found that the orders were made in good faith, the failure to advertise for bids renders the contracts void. It is not, however, a bar to an action quantum meruit since the county board has the general power to purchase lumber for the erection and

repair of its bridges. It is not questioned that the county accepted, retained, and used the lumber for the benefit of the county.

The evidence is not disputed that the fair market value of the lumber purchased by the county of Saunders was in excess of the amount claimed by the plaintiff. The plaintiff may not, however, recover in quantum meruit an amount in excess of the contract price even though the contract is void. Warren v. County of Stanton, *supra.* The judgment of the trial court is in accord with this rule.

It is contended that the contracts in the present case were not only void but that the obligation thereof is voided by virtue of sections 23-336, 23-337, and 23-338, R. R. S. 1943. We point out that these sections of the statute relate to contracts which contravene statutory limitations and are outside the scope of the powers delegated to a county. They do not relate to the illegal use of a granted power. In the present case the money to pay for the lumber purchased was on hand, having been properly assessed, levied, and collected. The general power to purchase lumber for the erection and repair of bridges is delegated to the county board, consequently the irregular exercise of the power does not defeat the right to recover quantum meruit for services and material furnished where the transaction was made in good faith. This court has so construed these statutes in Bartlett v. Dahlsten, 104 Neb. 738, 178 N. W. 636. With reference to section 1104, Rev. St. 1913, now section 23-336, R. R. S. 1943, the court in that case said: "It was not the intention of this statute that counties should be denied the exercise of those powers which are found to be necessary to carry into effect a power specially granted. If that were the intention it would in many instances effect a repeal of those very provisions of the statute expressly granting the power, for to take away the means of performance is to destroy the power itself. Such would be the result in this case. The pro-

vision of the statute referred to, we take it, was intended to prevent counties from entering into those contracts, express or implied, and was intended to declare such contracts unlawful, where no statutory authority is to be found justifying the making of such a contract." We concur in the view that sections 23-336, 23-337, and 23-338, R. R. S. 1943, void the obligation of the illegal contract only where the contract is contrary to a statutory limitation, or where there are no funds legally available at the time with which to pay the obligation, or in the absence of a statute expressly authorizing such contract. It has no application where the county has general authority to make the contract but the power has been irregularly exercised.

The findings of fact, which have the effect of a jury verdict, are supported by the evidence. Under the law of this state, as herein stated, plaintiff is entitled to recover quantum meruit, not in excess of the contract price. The judgment of the district court, being in conformity with the foregoing pronouncements, must be affirmed.

AFFIRMED.

SIMMONS, C. J., dissenting.

I dissent.

Because the trial court in its findings of fact and judgment used the one word "plaintiff" instead of "defendant" the court holds that it is powerless to determine the facts, presented by this record, contrary to the determination of the trial court.

By a general finding for the plaintiff the trial court precluded this court from reviewing the facts, save to determine if evidence is sufficient to sustain the finding. Had the trial court found for the defendant, then the plaintiff would have been denied a review of the facts here, save to determine if the evidence is sufficient to sustain the finding.

I submit that the issue of "good faith" upon which this court rests its decision was not an issue before the

trial court and hence was not decided by it. As a corollary to that I submit that the rule stated by the court in its syllabus point No. 1 is the remnant of a series of rules designed to limit the review of appellate courts, substantially all of which have been set aside either by constitutional amendment, statutory enactments, or judicial decisions. The rule now followed has no substantial merit and should be discarded in the light of the demand for full review of causes in this court.

I recognize that when the opinion of this court is filed and becomes final in this case it will be determinative of the cause here presented. It will also state the law generally and the construction of the statutes here involved.

However, the construction put upon the statutes here involved has not been the construction heretofore placed thereon and is contrary thereto.

The Legislature is now left helpless to protect counties or other subdivisions of government from the expenditure of funds under the facts that are shown to have existed here. I shall develop these and related matters in the course of this dissent.

What were the issues? The plaintiff sought recovery on 11 causes of action based on contract, each for amounts less than $500. It sought recovery on the same causes in quantum meruit. We are agreed on that.

The county did not defend this action. It defaulted. Its board of supervisors was directly involved in the fact situation presented. It neither undertook to affirm or deny the liability of the county. Individual members testified as witnesses for the plaintiff. Reference will be made later herein to their testimony. A taxpayer defended the action. He denied generally and as to the issue here pleaded specifically:

"4. That the defendant is not indebted to the plaintiff in the sum of $4832.00, nor in any other amount, for bridge lumber or other materials alleged by plaintiff to have been delivered to defendant pursuant to 'purchases'

made by William Stewart, the Highway Commissioner of Saunders County, between the dates of May 27, 1954, to July 2, 1954, both inclusive; that the Board of Supervisors has never entered into any contract or agreement with plaintiff for the purchase of the bridge lumber alleged by plaintiff to have been delivered to defendant; that any bridge lumber purchased by William Stewart from plaintiff was purchased without the knowledge, consent, authority or direction of the Board of Supervisors; that plaintiff knew, or in the exercise of reasonable prudence should have known, that William Stewart had not been authorized or directed to purchase lumber by the Board of Supervisors.

"5. That if any bridge lumber was delivered by plaintiff to defendant as the result of 'purchases' made by William Stewart between May 27, 1954, and September 2, 1954, it was in fact delivered pursuant to two orders made by William Stewart; that for the purpose of attempting to defeat the provisions of law requiring the Board of Supervisors to let contracts for bridge lumber to the lowest bidder and to enable the plaintiff, with the knowledge and approval of William Stewart, to make claim against the defendant for sums greatly in excess of the market value and in excess of the reasonable value of any bridge lumber delivered and greatly in excess of the sum for which such lumber could have been purchased by bid, the plaintiff and William Stewart have deliberately and intentionally represented to the defendant that the two orders were eleven separate and distinct purchases, that each purchase was for a particular and different job or bridge, and that each of such purchases was for a sum less than $500.00."

Here it should be specifically noted that in its summary of the answer the court does not even mention the allegation "that for the purpose of attempting to defeat the provisions of the law requiring the Board of Supervisors to let contracts for bridge lumber to the lowest bidder," etc.

In reply plaintiff alleged, and I quote the complete reply:

"Plaintiff alleges in reply to paragraph four of said answer that prior to acceptance of the orders for lumber involved herein, the County Board of Supervisors of Saunders County, in regular session, had authorized and directed the purchase of lumber by William Stewart, Highway Commissioner, when required or needed in amounts less than $500.00. *That plaintiff's agent and salesman had* been present at regular meetings of said board, *both before and during* the purchases in issue, when purchases of lumber by said Highway Commissioner, *including purchases herein involved, were reported, discussed and approved* by said Board and the members thereof. That the *members of said Board had knowledge* of the purchase, delivery and use of the lumber involved in plaintiff's claims and prior to the purchase of such lumber had approved and paid claims for other purchases of lumber *similarly made* by said Highway Commissioner. That said County had adequate funds available, according to law, for the purchase of such lumber. That by reason of the facts aforesaid, *if any irregularity exists* relative to the contract for purchase of said lumber, the County of Saunders is *estopped* to deny liability in respect of the purchase of said lumber.

"Plaintiff further alleges that, by reason of the facts aforesaid and the allowance of plaintiff's claims, said County of Saunders fully approved and *ratified* the purchase of said lumber from plaintiff.

"For further reply plaintiff denies all of the allegations of paragraph 5 of said answer and alleges that the amount claimed for the lumber involved in plaintiff's claim is actually below the reasonable value of the lumber so sold and delivered." (Emphasis supplied.)

In summary plaintiff in reply pleaded that it had knowledge of the facts of these purchases, for its "agent and salesman" was present when these and prior purchases were "reported, discussed and approved"; and that

the members of the board had a similar knowledge of the facts of these purchases and had paid prior claims. Here the court ignores plaintiff's judicial admission that it was present when purchases of lumber "including purchases herein involved, were reported, discussed and approved." That admission relates not only to the ones here involved but also to other purchases "similarly made" that form the basis of the plea of estoppel and ratification.

What was the defense tendered on that pleading? It was that "by reason of the facts aforesaid" the county was "estopped" to deny liability. The defense of plaintiff was then "estoppel" and ratification. The court, in its opinion, mentions the plea of estoppel—and then pays no further attention to it.

In Anderson v. Anderson, 155 Neb. 1, 50 N. W. 2d 224, we held: "A litigant may not present an issue for determination and avoid the effect of an adjudication or estoppel by withholding proof thereof. * * * Facts alleged in a petition to which the defendant in his answer pleads a waiver, an estoppel, or a matter to avoid, will be treated *as admitted,* though the answer also contains his general denial." (Emphasis supplied.)

In Giacomini v. Giacomini, 163 Neb. 798, 81 N. W. 2d 194, we held: "A plea of estoppel in pais may be joined with a general denial when the averments *by way of estoppel are not inconsistent* with such denial." (Emphasis supplied.)

I submit that the defense and only defense of the plaintiff to the charge of illegality of these contracts was that of estoppel based on the knowledge of the plaintiff *and* the knowledge of the county board. I submit that such a defense is inconsistent with the general denial.

The court in its decision ignores the basic plea of estoppel which the plaintiff asserted as a defense and decides the cause on an issue of good faith. It joined issue generally. However, by pleading the estoppel to avoid the facts which the plea of estoppel presents, the

facts denied generally are to be "treated as admitted" and as "inconsistent with such denial."

Plaintiff in its brief here summarizes the issues presented by the taxpayer in his answer as follows:

"2. Claimant and William Stewart, county highway commissioner, falsely represented there to be eleven orders, where actually all of the lumber was ordered in two orders.

"3. The purchases were separated into eleven orders to defeat the provisions of law requiring the board of supervisors to let contracts for lumber to the lowest bidder."

Plaintiff summarizes its reply as follows:

"1. Prior to acceptance of the lumber orders involved, the board of supervisors, in regular session, had authorized and directed William Stewart, highway commissioner, to purchase lumber when required or needed in amounts less than $500.00.

"2. That plaintiff's agents and salesman had been present at regular meetings of the board of supervisors, when purchases of lumber by the highway commissioner, including purchases herein involved, were reported, discussed and approved by the board of supervisors and the members thereof.

"3. That the board of supervisors had knowledge of the purchases, delivery and use of the lumber involved in plaintiff's claims and prior to the purchase of said lumber had approved and paid claims for purchases of lumber similarly made by the highway commissioner.

"4. That said county hal (sic) adequate funds available, according to law, for purchase of said lumber.

"5. That if *irregularity exists* relative to purchase of said lumber, the County of Saunders is *estopped* to deny liability.

"6. That by reason of the above facts and allowance of plaintiff's claims, the County of Saunders approved and ratified the purchase of lumber involved from the plaintiff."

It will be noted that plaintiff here makes no contention of the issue of good faith upon which the court rests its decision. Its entire summary of the pleadings (except for the general denial) leads to the ultimate defense of estoppel and ratification.

Plaintiff summarized the issues here as follows:

"The real questions in this case are:

"1. Did the lumber orders given by Stewart, under direction of the county board, amount to valid contracts between appellee and Saunders County, either in the first instance or by ratification?

"2. If the power and authority of the county to purchase lumber was irregularly exercised, to the extent that appellee can not recover on contract, is the county liable for the reasonable value of the lumber, in quantum meruit?"

We have held: "Where the record on appeal to this court clearly shows that the case was tried and determined in the court below upon a certain theory, it will ordinarily be considered and decided in this court upon the same theory, even though such theory may be somewhat at variance with the pleadings." Hunt v. Chicago, B. & Q. R. R. Co., 95 Neb. 746, 146 N. W. 986.

We have also held: "An issue not presented in the trial court may not be raised for the first time in the Supreme Court." Freeman v. City of Neligh, 155 Neb. 651, 53 N. W. 2d 67.

Here the issue upon which the court decides the case was not pleaded nor was the cause tried upon that theory.

Able counsel for the plaintiff do not even mention here the rule of law relied on by the court and stated in syllabus No. 1.

Now what about the rule that this being a law action the findings of fact based on conflicting evidence must be accepted here because it is "equivalent to the verdict of a jury."

It is a rule of long standing and repeatedly followed.

We stated it as late as Powell v. Farmers State Bank, *ante* p. 180, 82 N. W. 2d 260.

There are fundamental differences between our consideration of a jury verdict and the consideration of the findings of fact made in a law action by the court without a jury.

One is that if evidence is improperly admitted in a trial to a jury that is prejudicial to the losing party we have the power and duty to reverse.

In a situation where a jury is waived on appeal we review the facts only to find if there was proper evidence to sustain the findings of the trial court, without any way of knowing what evidence the court weighed in coming to its decision.

In a trial to a jury, the court by its instructions puts in writing its theory of the applicable law. On appeal we can reverse if the court's theory of the controlling law is erroneous. We know what it was. Under the rule which we have followed, and which the court now follows here, we have no way of knowing what the trial court's conception of the applicable law may have been. It may have been entirely erroneous. Had the trial court had a correct legal theory in mind, the conclusion of fact might well be different. However, if it led to a conclusion of fact which we can sustain under a correct legal principle then an affirmance is required without regard to what rule the court followed in determining the facts.

The trial court goes from a finding of fact to a conclusion under rules of law. We have no way of knowing, under a general finding, what facts or law the trial court acted upon. We are completely in the dark as to the facts or law that were deemed controlling by the trial court. So we reverse the process and take a proper rule of law and hunt for facts that will sustain the finding.

I have repeatedly voted for opinions based on that rule and no doubt have used it as a ready answer to

problems presented. In my judgment it is fundamentally unsound and should be discarded. This case is a good one to illustrate its fallacies, for a reading of the court's opinion shows that the whole conclusion of the court rests upon the application of the rule of law stated in syllabus No. 1. This presents a good case upon which to investigate the basis of the rule.

The rule, as I understand it, rests in the ancient distinction between the function of trial and appellate courts in that the trial court was a trier of facts and appellate courts dealt with questions of law only and would reverse a fact judgment only for legal errors. But who knows what legal errors were in the mind of a trial court when a general finding of fact only is made without even a finding of a rule of law as a guide to the operation of the trial court's mind?

The rule which the court follows here is a remnant of the old writ of error procedure which presented to an appellate court only questions of law. But the writ of error in civil cases has long since been abolished in this state. § 25-1930, R. R. S. 1943. This provision was first enacted by the Territorial Legislature in 1858. See Code of Civil Procedure, Territorial Laws 1858, section 539. It was reenacted by the Territorial Legislature in 1866. See Code of Civil Procedure, Territorial Laws 1866, section 599.

After statehood, it became section 599 of the Code of Civil Procedure and is found at page 632, G. S. 1873.

Although the writ of error in civil cases has been abolished in this state since 1858, the remnant rule that rests upon that writ remains.

Irwin v. Calhoun & Croxton, 3 Neb. 453, was decided in February 1872. In that decision this court held that there was no appeal in equity cases to this court and that the only method for a review of either legal or equitable actions was by petition in error.

By act effective March 3, 1873, the Legislature provided for appeals in equity. G. S. 1873, p. 716. See

Nebraska Loan & Trust Co. v. Lincoln & B. H. R. R. Co., 53 Neb. 246, 73 N. W. 546.

In Wilcox v. Saunders, 4 Neb. 569, followed in Troup v. Horbach, 62 Neb. 564, 87 N. W. 316, this court held that an appeal brings the whole case to this court for trial de novo. Nevertheless the court continued to apply the remnant writ of error rule even in equity cases. See Gibson v. Hammang, 63 Neb. 349, 88 N. W. 500, where we stated the rule that: "* * * if the evidence is conflicting, or if there is evidence sufficient to sustain the findings of the district court, its determination of questions of fact will not be disturbed, even though we might have reached a different conclusion if called upon to decide such questions in the first instance."

Also see Frerking v. Thomas, 64 Neb. 193, 89 N. W. 1005, wherein we held: "In reviewing a cause on appeal, where the findings and decree of the trial court can not be reconciled with any reasonable construction of the testimony, the same will be set aside as unsupported by sufficient evidence."

I have cited these cases from many that could be cited because they were decided in 1901 and 1902.

In 1903 the Legislature enacted what is now section 25-1925, R. R. S. 1943, Laws of Nebraska 1903, chapter 125, page 631. That act required this court in an equity action to "reach an independent conclusion" as to what findings are required, without reference to the conclusion reached by the trial court even though there be evidence in support thereof.

Nevertheless this court continued to follow the remnant writ of error rule where there was conflicting evidence. However, in these later years we have followed it only in cases of irreconcilable conflict. We have recognized the essential unsoundness of the remnant rule in equity cases and have properly moved to relax its rigors. But it is not so in law actions tried to the court without a jury.

It was provided in the 1875 Constitution that: "The

right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied." Art. I, § 24.

The amendment was prompted by the fact that the right of appeal by appeal, error or otherwise had been a statutory right—and had been denied where no statutory authority existed.

Section 583 of the Code of Civil Procedure (G. S. 1873, page 628), provided: "A judgment rendered or final order made by any court, board, or tribunal, mentioned in the preceding sections, may be reversed, vacated, or modified by the supreme court, for errors appearing on the record; but the petition in error, in such case, can be filed only by leave of the supreme court, or a judge thereof."

In State ex rel. City of Lincoln v. Babcock, 19 Neb. 230, 27 N. W. 98, it was held that the effect of the constitutional provision was to repeal so much of section 583 of the then code "as relates to the allowance of a petition in error."

But the remnant rule remained and has been applied without relaxation although it effectively denies a party the right to have a review of findings of fact in a law action tried to the court without a jury except in those cases where he can show that there is no evidence at all to sustain the trial court. In most cases that is no review of fact at all.

Section 584 of the Code of Civil Procedure provided for proceedings in this court by petition in error to reverse, vacate, or modify a judgment of the district court. G. S. 1873, p. 628. This and other provisions were repealed in 1907. Laws 1907, c. 162, p. 495. This section provided for appeals to the Supreme Court in all civil cases. It is now with amendments, section 25-1912, R. R. S. 1943. The "appeal" in civil cases was recognized as a right in Gentle v. Pantel Realty Co., 120 Neb. 630, 234 N. W. 574.

In Hoover v. State, 126 Neb. 277, 253 N. W. 359, we

held that all judgments other than those made felonies or misdemeanors by the criminal statutes "are reviewable by appeal."

Although writs of error in civil cases and petitions in error in civil cases to this court have long since been abolished, nevertheless the remnant rule remains.

By legislative act, often at the suggestion of this court, and by judicial decision, many of the old rules of procedure have been put aside in the interest of removing barriers that prevent a full consideration of a cause here on appeal.

There is no reason, save adherence to an ancient rule, that prevents this court from giving the same full consideration to facts and law in a law action tried to the court without a jury that is presently accorded a litigant in an equity action. It would be an advance in the science of jurisprudence to recognize that fact and have the rule now applicable to appeals in equity actions applicable to law actions tried to the court without a jury.

And now I go to the facts of this case.

The court summarizes the evidence into two pages. I prefer to make a more detailed statement of the evidence which I find in this record coming almost entirely from plaintiff's witnesses and plaintiff's records. Later in discussing the court's conclusions I will restate parts of it.

Prior to the purchases here involved, the county made its last purchase of lumber in carload lots in August of 1953. Thereafter in the fall and winter of 1953-1954 the highway commissioner purchased lumber of plaintiff at different times. These purchases were all invoiced in amounts less than $500 and the claims were allowed by the county. These invoices total several thousand dollars.

The first of this series of invoices is dated November 18, 1953, and the last four are dated February 24, 1954. Unless otherwise stated, all dates hereinafter used are for the year 1954.

It appears that on February 25 the county had a substantial stockpile of lumber on hand. At that time the highway commissioner had calculated the anticipated needs for lumber. At its February 1954 meeting the highway commissioner appeared before the board and asked what they were going to do about obtaining lumber and asked, "Do you want me to work up an invitation to bidders?" He was told to consult with the bridge committee, to buy the lumber as needed, and to stay under $500 in cost amount. Further details as to these instructions will be set out later in this opinion.

Thereafter two invoices dated May 28 were presented to support a claim for $908.29. One invoice refers to 40 pieces, the other to 41 pieces. The invoices describe identical lumber except as to number of pieces. These invoices were paid.

Previous to and thereafter, and dated May 27, June 4, June 7, June 11, June 14, June 18, June 21, June 25, June 28, June 30, and July 2, 11 separate orders were executed by the highway commissioner and delivered to the plaintiff. They are the basis of the claim involved in this litigation.

On June 10 delivery was made to the county at plaintiff's yards of the lumber involved in the first three of these orders.

The orders of May 27 and June 4 contained lumber of identical description, the first order being for 28 pieces and the second for 11 pieces. The orders of June 11, 14, and 18 included a total of 320 pieces of one description of lumber. These 320 pieces were delivered to the county at plaintiff's yards on July 2. There was also delivered at that time 50 pieces of a total of 80 pieces of another description which had been included in the orders of June 14, 18, 21, and 25. Thereafter on July 9 there were delivered to the county 30 additional pieces of the same description of lumber that was delivered in part on July 2, There were also delivered 14 pieces of another description, 5 of which had been ordered on

June 25 and 9 on June 28. There were also delivered 14 pieces of another description, 7 of which had been ordered on June 30, and 7 on July 2.

The lumber so delivered to the county was taken to its yard and placed with other lumber in the stockpile there, from which it was later removed and used as the county's needs required.

There was no record made of the board's decision of February 1954 directing the highway commissioner to purchase bridge lumber as needed and in amounts of less than $500 in value. It is patent from the record here that the chairman of the board gave the instructions and that it was concurred in by other members of the board. The highway commissioner testified that the board assented. It is also patent that the instructions were repeated from time to time.

The chairman of the board fixes the time of the instructions to the highway commissioner as in February or March 1954. The chairman on direct examination testified that he told the highway commissioner "he better keep them in less than $500 lots to comply with the law." The chairman testified:

"Q In other words, if he needed $900 worth of lumber he was to order it in two orders so that neither order would be over $500, is that correct?

"A Well, I suppose. I instructed him to keep it under $500.

"Q And the reason for doing that, Mr. Hanson, was to avoid the provision of the statute which says that when it runs over $500 you are supposed to call for bids, isn't that true?

"A No, we didn't do it to avoid; we did that to comply with the law was my idea, trying to comply with it.

"Q In other words, you figured that *if you broke the need for $900 into two orders you were complying with the law?*

"A *That's what we thought, yes.*" (Emphasis supplied.)

The highway commissioner testified: "And they told me to buy lumber as we needed it as it come up in amounts of less than $500, and to contact the bridge crew and get their authority as to when to buy it—or the bridge committee."

The highway commissioner further testified that *one* of the reasons why he ordered as he did was to comply with his instructions to keep the orders under $500. It is patent that he complied with his instructions.

The plaintiff's president testified that he often attended the board meetings and knew the highway commissioner had been ordered to purchase lumber as needed. He personally handled some of the orders involved in this claim. He testified that he did not know that he heard "any such conversation" about keeping the orders under $500.

Part of the records of the handling of these purchases prior to those involved in this claim are in evidence.

The method of handling these orders intraoffice as testified to by plaintiff was in general as follows: When an individual order was received, it was given an order number. It was then held and, as additional orders were received, it was given the same order number as the first. That same order number was used until the material ordered was delivered. So at least, for bookkeeping purposes, the accumulated orders were treated as one entire order for the material delivered. Then a new order number was given to a succeeding order and the same procedure followed. Individual invoices were then made based on the material in each individual order and as such submitted to the county to support a claim for the entire amount. That procedure was not followed in these claims and invoices.

The invoices dated July 2, 6, 9, 10, 13, 14, 16, and 18, 1954, bear "Our Order No. 1244." The last three dated July 19, 22, and 23, 1954, bear "Our Order No. 1227."

These invoice dates are not related either to the date on the order or the date of deliveries. As above pointed

out, this lumber was delivered on June 10, July 2, and July 9, 1954. The material involved in the order of May 27 was invoiced, dated July 19. The order of June 4 was invoiced, dated July 22. The order of June 7 was invoiced, dated July 23. The order of June 11 was invoiced, dated July 2. The order of June 14 was invoiced, dated July 6. The order of June 18 was invoiced, dated July 9. The order of June 21 was invoiced, dated July 10. The order of June 25 was invoiced, dated July 13. The order of June 28 was invoiced, dated July 14. The order of June 30 was invoiced, dated July 16. The order of July 2 was invoiced, dated July 18. The invoice dated July 18, 1954, is shown as verified before a notary public on that date. July 18, 1954, was a Sunday. The evidence does not show that plaintiff was transacting business on that date.

I go now to some of the earlier orders and their handling as taken from plaintiff's records. On October 6, 1953, is shown an order for 85 pieces 3″ x 12″ x 16′ material. This bears a notation, "Okayed by Stewart phone," (Stewart being the highway commissioner). On October 9, 1953, "Phone by Stewart" is shown on order for 65 pieces 3″ x 12″ x 16′ of the same material. On October 14 an order is shown for 150 pieces 3″ x 12″ x 15′ of the same material. It bears the writing, "Invoice in amounts of less than 500.00 per order," and below that, *"Separate Invoices,"* and two orders shown for 85 and 65 pieces, respectively. This has the endorsement, "Okayed by phone Stewart." The writing quoted above as to invoicing less than $500 per order was placed there by a *salesman of plaintiff* who explained by saying that the board chairman "would say not to go over five hundred dollars for any material * * *." Dated January 27, 1954, is shown an order for 80 pieces 3″ x 12″ x 16′ fir plank. A like order the following day calls for 70 pieces of the same material. On January 29, 1954, 150 pieces were delivered to the county at one time. The same day an office order was prepared by one of plain-

tiff's employees calling for 150 pieces. Below that is written, "Invoice in amounts of less than 500.00 as below" and "*Make Separate Invoices.*" Below that are entries of two separate orders, one for 80 and one for 70 pieces. It is noted that the instructions were not to invoice as per each order but to invoice for less than $500.

The record shows that on January 29, 1954, the county made a separate order for 30 pieces of 3″ x 12″ x 18′ lumber. On January 30, 1954, 12 pieces of 6″ x 16″ x 24′ were ordered. January 31 was a Sunday. February 1, 1954, 75 pieces of 2″ x 12″ x 16′ were ordered. On February 1, 1954, that lumber (plus 32 pieces of 3″ x 12″ x 18′) was delivered to the county. On the same day an office order was prepared for the total of this delivery with the notation, "* * * Make Separate invoice for each item."

On April 21, 1954, there was a consolidated order made out by a salesman for 120 pieces of 3″ x 12″ x 22′ material. It bore the notation, "Bill under $500.00 See attached," written by the salesman. Attached were separate orders signed by the highway commissioner dated April 16, 19, and 21, 1954.

Plaintiff's president testified as to an intimate knowledge of the transactions of this business and that he quite often went over the invoices before they went out. He testified that the plaintiff had a very good reason for making these notations on the office-prepared orders, saying, "we had been warned several times that a competitor of ours was going to tie up our funds in Saunders County, and I wanted to be very sure that I could give him no reason to tie up our funds in Saunders County."

That is the story of the system of handling purchases and sales initiated in 1953 by the highway commissioner and the plaintiff. It shows that when the board, in February 1954, informally instructed the highway commissioner to make purchases in amounts of less than $500 in value, that that action was only directing him to con-

tinue to purchase as had been theretofore done. It shows also that plaintiff's officers, employees, and salesmen knew what was being done, why it was being done, and cooperated fully in the execution of the plan.

Two other matters should be mentioned. There is no claim here that any of the orders involved were in the nature of emergency orders. Rather the orders were made to keep the county stockpile of lumber reasonably adequate for needs that might arise.

There is considerable evidence in the record that in the late spring of 1954 there were stories of an expected strike of labor in the lumber-producing regions of the Pacific Northwest. That strike became effective in the summer of 1954. However, there was no strike or threat of a strike when this plan of making purchases and sales was devised in 1953. The chairman of the board testified that he had no knowledge of a pending strike when he first gave the highway commissioner the order to buy under $500 in cost in 1954. This situation is advanced as a reason for buying in small quantities. There is evidence that lumber of the kind here involved could not be purchased in carload lots during this period of 1954. We find no evidence of an attempt to buy lumber in quantity at any time after 1953 in compliance with the statute.

The court states that the evidence shows facts as to orders previously received "from which it might be inferred that *some connivance* may have existed between the *plaintiff* and Stewart, the highway commissioner, to avoid the requirements of the statute." (Emphasis supplied.) Webster defines connivance as "passive cooperation, as by consent or pretended ignorance, especially in wrongdoing." I accept the definition. I point out, however, that the connivance, the cooperation in wrongdoing by the plaintiff that was involved in the "orders previously received," was by judicial admission in the plaintiff's reply carried forward into the 11 orders here involved. That was a necessary admission as a

foundation for the plea of estoppel and ratification.

But it need not rest on a judicial admission alone. Plaintiff's evidence and records establish the fact that the conniving was a continuing process reaching into the orders here involved.

Why were the pleadings so drafted? It appears without dispute from plaintiff's records that beginning in the fall of 1953 these orders were being split, consolidated in the plaintiff's office at times and at times by the salesmen, and after delivery of the lumber, invoices in less than $500 based on the split orders were filed and claims paid. These facts were not of record in the county offices. The claims were filed so as to conceal those facts. In February of 1954 the highway commissioner at a regular meeting of the board asked for instructions as to whether he was to "work up an invitation to bidders." He was told to buy in small lots as lumber was needed "in amounts of less than $500." It was at that meeting that the board, as a board, had knowledge of what was being done and approved its continuance. Hence the plea of plaintiff's knowledge "both before and during the purchases" which were "reported, discussed and approved" by the board. To give any validity to the plea of estoppel it was necessary to bring that knowledge home to the board. Hence the plaintiff pleaded its own knowledge, the knowledge of the board, and the payment of claims with that knowledge.

What is the evidence that relates this conniving to the orders here involved? The court says that Mr. Stewart, the highway commissioner, was directed to buy "in small lots of less than $500 *until* the market became stabilized and conditions became more normal."

I quote the exact testimony of plaintiff's witnesses both as to the directions and the reasons given:

Mr. Hanson, plaintiff's witness, and chairman of the board, testified:

"Q Now, you testified on direct examination that you

instructed Mr. Stewart to keep the orders below $500, didn't you?

A I did.

Q In other words, if he needed $900 worth of lumber he was to order it in two orders so that neither order would be over $500, is that correct?

A Well, I suppose. I instructed him to keep it under $500.

Q And the reason for doing that, Mr. Hanson, was to avoid the provision of the statute which says that when it runs over $500 you are supposed to call for bids, isn't that true?

A No, we didn't do it to avoid; we did that to comply with the law was my idea, trying to comply with it.

Q In other words, you figured that if you *broke the need* for $900 into two orders you were complying with the law?

A That's what we thought, yes." (Emphasis supplied.)

Mr. Stewart, the highway commissioner, testified as to the making of these orders. He was asked and answered as follows:

"Q Isn't it true, Mr. Stewart, that on May 27th, 1954, you could just as well have ordered all of the lumber that you ordered June 4, 1954?

A I could have. It might not have been available at the time.

Q And that the *only* reason you didn't order it was to comply with Mr. Hanson's instructions to keep the orders under $500, isn't that true?

A I wouldn't say that was the *only* reason. There may have been other reasons why it wasn't ordered." (Emphasis supplied.)

The court states: "The president of the plaintiff company *positively* denies that any orders received were in excess of $500 or that any orders were split to make them less than $500" and that the trial court was justi-

fied in holding that plaintiff had no "intent to fraudulently circumvent the statute."

The court finds evidence of conniving as to the earlier transactions, but finds none as to those here involved. The only difference between the two in this regard is that the earlier claims were paid, while those here involved were not.

Now what is the evidence as to the knowledge of the plaintiff's president and as to participation in the conniving as to these orders here involved? The plaintiff's president, Mr. Ward, testified as to full knowledge of all these transactions. The plaintiff's pleadings admit it.

Four of the orders involved in this litigation were taken by Mr. Ward, plaintiff's president. The remaining seven orders were taken by Mr. Morrissey, a salesman for plaintiff.

The conclusion to buy in amounts less than $500 was openly arrived at, so far as the witnesses reveal, at a regular board meeting in February 1954.

Mr. Ward testified that he made regular visits to Wahoo as a salesman; that he was present at board meetings four or five times during the time this lumber was being purchased when lumber needs were discussed and when Mr. Stewart was instructed to purchase lumber; that all orders taken by him were obtained in the courthouse; and that he overheard the conversations about the purchase of lumber and the directions to buy. He sustained the allegations of plaintiff's reply.

He was then asked and answered:

"Q Now, did you hear any talk about keeping the orders below $500?

A *I don't know that I heard any such conversation. I simply heard a direction to buy lumber.*" (Emphasis supplied.)

That is the extent of his positive (?) denial. He does not deny knowledge of what was being done.

I find no direct evidence that Mr. Ward was present at the February 1954 meeting when this plan of pur-

chase was openly stated. He puts himself at several of the meetings. Mr. Stewart testified that he might have been there and that he or some other salesman might have been there. Mr. Stewart three times avoided answering whether or not he had told Mr. Ward or any representative of the plaintiff about his instructions to buy in amounts of less than $500. *Mr. Ward denied only to the extent that he did not remember any conversation with them about splitting orders.*

We now go to the testimony of Mr. Morrissey, the salesman who obtained the balance of the orders involved in this litigation. He was present in the courthouse and heard conversations between Hanson and Stewart regarding the purchase of lumber.

Under date of April 16, 1954, Mr. Stewart signed an order for 39 pieces of lumber, under date of April 19, 1954, there was an order for 40 pieces, and under date of April 21, 1954, there was an order for 41 pieces, or a total of 120 pieces of exactly the same description of lumber at a price of $1,345.61.

These appear on a consolidated order form for 120 pieces below which is written by Morrissey: "Bill under $500.00. See attached." Attached are the delivery sheets showing delivery at *one time* and Mr. Stewart's separate orders. The consolidated order is signed by Mr. Morrissey, the salesman, and bears the annotation that it was "okayed" by the board of supervisors, which was written by Mr. Morrissey.

An order taken by Morrissey on October 14, 1953, shows a total of 150 pieces ordered—stricken out— and "Separate Invoices" written in, making it into two orders. This shows "Okayed by phone Stewart." Mr. Morrissey testified it was a phone call. Yet attached to it are two separate orders "Okayed" by Stewart "by phone."

Other orders were similarly handled. They show inescapably that Mr. Morrissey was taking the split orders, consolidating them to submit to the plaintiff, getting their approval in consolidated form by the board, and

that he was doing it so as to keep all orders under $500 and obviously doing it with knowledge of the plan that was being followed.

It is in evidence that the invoices involved in these claims were "proofread" by Mr. Ward. He knew what was going on. If this record does not establish knowledge on the part of the plaintiff, then it is futile for anyone ever to attempt to show knowledge. In fact it goes further and shows a full cooperation in the procedure by which evasion of the law was carried out.

I readily concede that most of the direct evidence of the conniving relates to previous transactions that had been paid. But it was all one plan, all carried out in the same way by the same officers and the same salesmen. The fact that the earlier claims had been paid does not wash out all of the correlated executed plan to "avoid the requirements of the statute."

The court states that the taxpayer's contention that there were but 2 orders in excess of $500 (and not 11 orders under $500) is based on the fact that the first 8 invoices bear No. 1244 and the last 3 invoices bear No. 1227. That is an understatement "more than slight," to use a comparative negligence expression.

The above is but one single fact among the many that is the basis of the taxpayer's contention.

The explanation given by plaintiff's president and accepted by the court is that orders are held and given a consolidated number when deliveries are made and then subsequent orders receive a new number. What is the evidence?

The invoices that bear order No. 1244 are dated July 2, July 6, July 9, July 10, July 13, July 14, July 16, and July 18, 1954. The invoices that bear order No. 1227 are dated July 19, July 22, and July 23, 1954. The earlier No. 1227 is on the latter invoices and the later No. 1244 is on the earlier invoices so far as dates of invoices are concerned.

The lumber involved in the invoice dated July 2, 1954,

bearing order No. 1244 was delivered July 2. The lumber involved in the invoice dated July 6 bearing order No. 1244 was delivered July 2. The lumber involved in the invoice dated July 9 and bearing order No. 1244 was delivered July 2. The lumber involved in invoice dated July 10 and bearing order No. 1244 was delivered July 2. The lumber involved in invoice dated July 13 and bearing order No. 1244 was delivered July 9. The lumber involved in an undated invoice but "date shipped" July 14, bearing order No. 1244, was delivered July 9. The lumber involved in invoice dated July 16 and bearing order No. 1244 was delivered July 9. The invoice dated July 18, bearing order No. 1244 (for an *identical* amount of lumber as that invoiced on July 16), was delivered on July 9, 1954. The lumber involved in invoice dated July 22, 1954, bearing order No. 1227, was delivered June 10. The lumber involved in invoice dated July 23, bearing order No. 1227, was delivered June 10.

The above analysis of the invoices shows that the orders bearing No. 1227 were delivered June 10. That fits plaintiff's explanation of its bookkeeping practices. The first four invoices bearing order No. 1244 were delivered July 2. That fits plaintiff's explanation of its bookkeeping practices.

The next four invoices bearing order No. 1244 were delivered July 9. *That does not fit into plaintiff's explanation of its bookkeeping practices.* Yet the court does not mention it and holds that the trial court could properly accept plaintiff's statement although it was directly contrary to the undisputed records made by the plaintiff at the time. The court finds no inference of conniving from the above facts from plaintiff's records as to the transactions here involved. But let's go further.

In the above I have been talking about invoice dates and order numbers. I now repeat a paragraph from my statement of the facts which shows the *dates* of the *orders* and the dates of delivery and their lack of any

relationship to the *dates* of the *invoices*. The court does not mention this evidence.

As above pointed out, this lumber was delivered on June 10, July 2, and July 9, 1954. The material involved in the order of May 27 was invoiced, dated July 19. The order of June 4 was invoiced, dated July 22. The order of June 7 was invoiced, dated July 23. The order of June 11 was invoiced, dated July 2. The order of June 14 was invoiced, dated July 6. The order of June 18 was invoiced, dated July 9. The order of June 21 was invoiced, dated July 10. The order of June 25 was invoiced, dated July 13. The order of June 28 was invoiced, dated July 14. The order of June 30 was invoiced, dated July 16. The order of July 2 was invoiced, dated July 18. The invoice dated July 18, 1954, is shown as verified before a notary public on that date. July 18, 1954, was a Sunday. The evidence does not show that plaintiff was transacting business on that date.

The evidence of the notary, an employee of the plaintiff, is undisputed that the affidavit as to date of that invoice is false.

These invoices are the only records that appear in the county's records. The evidence of their falsity is in the plaintiff's records and was dug out and produced by the taxpayer. Why were these false dates made on the invoices? Was it a good faith act or a conniving act?

Mr. Ward, president of the plaintiff company, testified that it was his practice to examine and approve these invoices. The record was in his office in connection with these invoices that showed on their face what was being done. Mr. Ward in explaining some of these matters said that they had very good reason for doing what was done because they had been warned that a competitor was going to tie up their funds and wanted to give him no good reason for doing so. What did he have to fear except the knowledge of the way these orders had been split in their inception with the "intent to fraudulently circumvent the statute"?

Plaintiff in its brief here says that the "dates of invoices are not evidence of bad faith," and that the fact that one invoice was dated on Sunday was an immaterial "office error." Are they evidences of good faith? Neither the plaintiff nor the court seems to think so. Possibly one "office error" of a date would not be material but these 11 falsely dated invoices go beyond that to a designed plan to conceal and to connive. The court neither explains, justifies, or excuses these matters. It ignores them. However, they are a part of the undisputed story of the conniving.

On the evidence set out by the court it finds that there is evidence to sustain a finding that there were 11 orders and not 2 orders involved and that there was evidence to sustain a finding that there was no intent to fraudulently circumvent the statute. The court holds that the "findings of fact made by the trial court" are "conclusive upon this court on appeal."

The trial court made no such findings. This court makes the findings fitting them into the trial court finding for "the plaintiff and against the defendant." The trial court did not even find whether recovery was to be had on contract or on quantum meruit. The findings made here are those which this court conceives the trial court might have found.

On this record to me the conclusion is inescapable that orders for lumber were split into small orders for the purpose of bringing the cost of each order within the statutory limit of $500. The parties say so. Plaintiff's records prove it. The invoices filed with the county do not reveal that fact. It is patent that the concealment was intentional. In view thereof I would find the judgment of the trial court is clearly wrong even under the court's rule of law as stated in syllabus No. 1.

It occurs to me that if the facts are that there were 11 contracts all for less than $500 and were good faith contracts, that that would end the matter and that plaintiff would be entitled to recover on contract under sec-

tion 39-810, R. R. S. 1943. But the court does not rest the decision on that ground.

It goes to a determination of whether the evidence is sufficient as a matter of law to bar recovery under the statute.

The evidence which the court states in this connection is evidence which the court has just put aside as beyond the reach of its consideration under the jury rule.

The court then quotes all but the concluding sentence of section 39-810, R. R. S. 1943. I shall refer to that sentence later herein.

The court then holds that the "statute gives the county board *general power* to erect and repair bridges" etc., and that the county board has "*general authority* to purchase bridge lumber for the erection and repair of bridges." (Emphasis supplied.) Up until this opinion was filed that has not been the law. The court states the rule that recovery is denied where the applicable statute prohibits the making of a contract and avoids the obligation thereof.

The court does not analyze the statute nor refer to our decisions. I suggest that if the court is right that the statute can stand the test of analysis.

The first sentence of section 39-810, R. R. S. 1943, is: "The county board of each county has the power to erect and repair all bridges and approaches thereto and build all culverts and make improvements on roads, *the cost and expense of which shall in no instance exceed five hundred dollars.*" (Emphasis supplied.) That sentence is a grant of power limited to a cost of not to exceed $500. It is not a general power as the next provision indicates. The third sentence is: "All contracts for materials for repairing, erecting, and constructing bridges and approaches thereto, the cost and expenses of which exceed five hundred dollars *shall* be let to the lowest responsible bidder, * * *." (Emphasis supplied.) That is a mandatory provision. It is a grant of power on condition, not a general power. It attaches to and is a

part of the power itself. In Cheney v. County Board of Supervisors, 123 Neb. 624, 243 N. W. 881, with reference to this statute we held: "The statutory language is clear that, where the cost and expense involved 'exceed five hundred dollars,' contracts relating to the following subjects *must* be entered into by county boards in compliance with its terms, viz., contracts for (1) erection and reparation of bridges and approaches thereto; (2) for building of culverts; (3) making improvements on public roads; (4) for furnishing materials in connection with the same." The mandatory "shall" is used in the statute. We construed it using the mandatory "must."

In People ex rel. Putnam and George v. Commissioners of Buffalo County, 4 Neb. 150, we stated this rule: "Whenever a statute requires the performance of an act for the sake of justice or the public good, the word 'may' is the same as 'shall' and imposes a positive and absolute duty." We have consistently adhered thereto down to and including State ex rel. Cashman v. Carmean, 138 Neb. 819, 295 N. W. 801. The statute, then, so far as above quoted, imposes an absolute duty on the county to contract in that manner and that manner only. To imply a power to contract otherwise would be to make compliance with the statute an optional act.

Any question as to that conclusion is removed by the remainder of the sentence just quoted from the statute and the succeeding sentence. It is: "* * * but the board may reject any and all bids submitted for such materials. *Upon rejection* of any bid or bids by the board, such board *shall* have power and authority to purchase materials to repair, erect or construct the bridges of the county, and approaches thereto." Obviously the only time that the board has the general power to let contracts without competitive bidding for materials in excess of a $500 cost is after a bid or bids have been received and rejected. The concluding sentence is, "*All* bids for the letting of contracts *must* be deposited with

the county clerk and opened by him in the presence of the county board, and filed in the clerk's office." (Emphasis supplied.) This is the sentence which the court does not quote. That provision requires the bids to be a matter of public record. Obviously no compliance with that provision has been made as to the contracts here involved.

The court ignores and reads out of the statute everything following "The county board of each county has the power to erect and repair all bridges and approaches thereto and build all culverts and make improvements * * *."

In Neumann v. Knox, 115 Neb. 679, 214 N. W. 290, we had before us a comparable statute applicable to cities and villages. The statute there involved was section 4180, Comp. St. 1922, as amended by Laws 1925, c. 51, § 1, p. 202, which provided that contracts for works to cost more than $500 should not be entered into "without advertising for bids." We enjoined a contract not so let. We also held: "It is evident that the legislature was intending to protect the citizens of cities and villages in the expenditure of their moneys by their officials, and also to protect the taxpayer from possible venality of the officials and prevent them from entering into improvident contracts for work or improvements, of the cost of which they might not be well advised."

Other courts have considered cases based on similar statutory provisions and under contentions such as the plaintiff makes here. Those courts have denied the existence of a general power and denied recovery.

In 10 McQuillin, Municipal Corporations (3d ed.), § 29.33, p. 279, there is this statement: "In some jurisdictions, the necessity of competitive bidding depends on the amount involved in the contract to be let. If applicable, such a requirement must be observed in good faith by the acting municipal authorities. And where a municipality is prohibited from letting contracts involving an expenditure of more than a specified sum

without submitting the same to competitive bidding, it cannot divide the work and let it under several contracts, the amount for each falling below the amount required for competitive bidding." Ellis v. City of New York, 1 Daly (N. Y.) 102, is cited to sustain the text. In that case Keyes had a contract for certain curb and gutter work. He made claim for additional work not covered in the contract which he performed at the direction of the street commissioner. The work involved several parcels of work which was ordered done at one time and as continuous work. The commissioner had no authority to contract work costing more than $250 without authority of the council and then only to the lowest bidder. Plaintiff claimed less than $250 for each parcel of work. The court denied recovery and held: "To hold, as the plaintiff's counsel contended on the argument, that the wall thus built being in four detached pieces, should be considered as four separate and distinct employments, each under $250, would be to declare in effect, that a positive prohibition in the charter might be *evaded and nullified by a plan so simple that it could scarcely be considered as rising to the dignity of a trick;* as I can hardly imagine any work required by the corporation to be done, that could not thus be divided into parts sufficiently small as to make the expense of doing each part come within the prohibition. The plaintiff's contract, even, would have been unnecessary, and indeed the entire streets of the city might be paved by the Street Commissioner without contract and without subjecting the work to public competition, if such a palpable violation of the law as is shown in the present case should be allowed to prevail." (Emphasis supplied.)

The plain meaning and intent of the holding is quite applicable in the instant case.

In 63 C. J. S., Municipal Corporations, § 996, p. 567, the rule is stated as follows: "Where a statute, charter, or ordinance requires advertising and public bidding, a municipal contract made in violation or evasion of these re-

quirements, and not within the terms of a special exception, is generally invalid and imposes no obligation or liability on the corporation * * *."

A case cited there is that of Wing v. City of Cleveland, 9 Ohio Dec. (Reprint) 551. In that case city officials were proposing to purchase material in violation of a statute which, among other things, required that all contracts exceeding $500 be awarded to the lowest and best bidder and have the approval of the council. An injunction was issued restraining the execution of the contract. The amount involved was $3,800. The officials then divided the purchase and made contracts so that no purchase exceeded $500. This was done by four resolutions passed at three different times. They were cited for contempt for violation of the injunction. It was contended that, having divided the purchase into quantities of less than $500, there was no violation of the injunction or statute. The court held: "It is very difficult for me to understand how anybody could have supposed that was a fair compliance with the provisions of this statute. It would be a very brief way of repealing this statute and setting it entirely at defiance. * * * it is impossible to reach any other conclusion in this case, than that these acts are wholly unlawful * * *." The court held that a "parceling" of the purchase was "a direct violation" of the statute.

State ex rel. Butler v. Dugger, 172 Tenn. 281, 111 S. W. 2d 1032, is quite comparable to the instant case. There a contract had been entered into with a bus operator to transport school pupils for $100 per month. The relator performed service under that contract for some time. It appears to have been determined, without litigation, that the contract was illegal because of a statutory requirement that such a contract, where the cost exceeded $100, should not be entered into until there had been advertisement and bids and then to the lowest bidder. In the course of the opinion the court held that the $100-a-month contract was illegal as a preliminary

finding to a decision of the case. Relator discontinued performance. The board then, pursuant to a resolution, entered into a contract with relator to operate the bus for $5 a day, payable weekly. Relator performed service for 9 days. The action involved an attempt to recover $45. The court held that the $5-a-day contract was a "patent effort" and an obvious attempt to evade the requirements of the statute. In the course of the opinion the court referred to Savage v. Macadam Co., 5 Tenn. App. 377. There macadam had been purchased at different times for the repair of streets, the aggregate purchases exceeding $500. Contracts involving more than $500 were to be let by public bidding. The court said: "It did not appear in that case that an undertaking which would necessarily involve the expenditure of more than $500 was purposely split up in order to avoid the charter limitations." Recovery was denied.

People ex rel. Whitlock v. Lamon, 232 Ill. 587, 83 N. E. 1070, is a comparable case. There the statute required all contracts for the construction of sidewalks where the expense exceeded $500 to be let to the lowest responsible bidder. The city desired to construct a sidewalk in front of contiguous lots in a block. The cost of the sidewalk in front of all the lots exceeded $500. The cost of the sidewalk in front of each lot was less than $500. The city entered into separate contracts with the same contractor for the sidewalk in front of each lot without any attempt to comply with the statutory requirement. The court denied recovery, holding: "No reason is suggested and no explanation is attempted by appellee for splitting up this improvement into four separate contracts. The reason for the course pursued is apparent. It is manifestly a mere shift for the purpose of evading section 7 of the sidewalk statute. If the method pursued by the city is sustained, section 7 of this statute will be rendered nugatory. If the sidewalk in front of each lot is to be regarded as a separate and distinct improvement it

would probably never happen that the cost of constructing a sidewalk in front of a single lot would exceed $500. Under appellee's contention a sidewalk extending the entire length of a street may be constructed at a cost of many thousand dollars and a private contract entered into for the entire work. The only thing necessary to evade the statute is to execute a duplicate contract for that portion of the walk in front of each lot."

Bigham v. Lee County, 184 Miss. 138, 185 So. 818, involved a statute that required competitive bidding for the purchase of supplies except that in cases of emergency, purchases could be made for sums less than $100 under certain circumstances. Without competitive bidding a supervisor purchased lumber totaling $613.62. No emergency existed. The purchases were for the repair of bridges. Bills for the lumber were submitted so that none of the itemized accounts would exceed $100. In denying recovery the court held that the manner of making the contracts "was a plain evasion of" the statutory requirements, and "The manifest purpose of the statutes is to safeguard public contracts, and to secure competitive bids from parties interested, to secure to the public fair contracts, and the advantages of competition."

But the court concludes that regardless of the "general power" the plaintiff cannot recover on contract for it concludes that "plaintiff is entitled to recover quantum meruit, not in excess of the contract price." This is based on the theory that "the county has general authority to make the contract but the power has been irregularly exercised." Here the court shifts from its conclusion that the evidence sustains a recovery on the basis of valid contracts and hence is an action in contract and proceeds to its ultimate conclusion that the contracts are void, but that recovery can be had quantum meruit.

This conclusion proceeds on two conclusions. The violations were irregularities and the statute does not avoid

the obligations of the contract. I shall discuss these contentions separately.

What is the "irregularity"? The obvious answer is the failure to comply with the terms of the statute. But the evidence as to the failure to comply has all been put aside by the court.

I again point out that in Cheney v. County Board of Supervisors, *supra,* we construed the statute here involved, using the mandatory "must be" complied with. We denied an injunction there, not because of an irregular exercise of the power, but because under the *facts* of that case the statutory restrictions in section 39-810, R. R. S. 1943, were not applicable to the work involved. Clearly under that opinion had the litigation involved "bridges and approaches" the injunction would have been granted. The court makes no reference to this opinion.

In Hunt v. Fenlon, 313 Mich. 644, 21 N. W. 2d 906, the court had litigation which involved the construction of a statute which required competitive bidding on all contracts involving an expenditure of $500 or more. The court followed its earlier decision in City of Saginaw v. Consumers Power Co., 213 Mich. 460, 182 N. W. 146, and held: " 'That a provision requiring competitive bidding is mandatory, that the municipality is not bound by contracts made in defiance of it, finds support in the great weight of authority and is in accordance with the holdings of this court.' " It cited with approval the text from 44 C. J., Municipal Corporations, § 2490, p. 324 (now 63 C. J. S., Municipal Corporations, § 1148, p. 811).

In State ex rel. Whedon v. York County, 13 Neb. 57, 12 N. W. 816, the statute required bids to be let on or before January 1 of each year and the letting of bids to the lowest competent bidder. A contract was let to one not complying with the terms of the statute. An unsuccessful bidder brought an original action in this court to compel the awarding of the contract to him on

the ground that he was the lowest bidder. We issued the writ, holding: "While the presumption is that the defendants acted in good faith in letting the contract in the manner they did, the statute points out their duties and the manner of performing the same, and this mode is exclusive."

The rule is stated as follows: "The purpose of a statute requiring the letting of bids to the lowest bidder is to invite competition, and to that end publicity of the intention to let the contract is of the essence of the proceeding. Hence, any statutory provisions requiring advertisement, or specifying its nature, are usually to be regarded as mandatory, and a failure substantially to comply with their requirements is sufficient to avoid the contract." 2 Dillon, Municipal Corporations (5th ed.), § 809, p. 1219.

I would hold that the statutory provisions of section 39-810, R. R. S. 1943, are mandatory and exclusive.

My objection to the quantum meruit rule as stated goes to its application here where it is resolved into a "heads I win, tails you lose" rule.

The court holds the county liable for the reasonable value of the material delivered under a procedure that in nowise complies with the mandatory statutory power of the board to purchase materials.

It does not appear that this fact and law situation has ever been decided by us. Other courts have considered and determined a contention of the right to recover reasonable value. We go now to those decisions, pointing out that they sustain a denial of recovery either on contract or quantum meruit.

The taxpayer cites Johnson County Savings Bank v. City of Creston, 212 Iowa 929, 231 N. W. 705, 84 A. L. R. 926. The facts are in part found in Jackson v. City of Creston, 206 Iowa 244, 220 N. W. 92. There the city council entered into four contracts for street improvements with one contractor. They were identical contracts except that each referred to a different street

to be improved. The contracts were let without competitive bidding. In the first case the court enjoined the levying of assessments and the issuance of bonds. In the second case the attempt was to establish the liability of the city upon the contracts and alternately for the value of the work done.

The defense was that there was in fact but one contract, divided into four contracts for the purpose of avoiding a budget law requirement that contracts to cost $5,000 or more required the adoption of plans and specifications, proposals for contract notice, and hearing. The contracts were entered into without submission to competitive bidding. The statute requiring competitive bidding was held to be "preemptory." The court held: "The statute is a prohibition upon letting such contracts in any other mode. * * * It is a general principle that a municipal contract entered into in violation of a mandatory statute, or a contract in opposition to public policy is not merely voidable but void * * * and that no contract for services rendered or goods furnished pursuant thereto can be implied, nor may the acceptance of benefits thereunder be made the basis of a liability by estoppel. * * * Municipal corporations are the creatures of the legislature. They have such powers to contract, and only such powers, as the legislature grants to them. When the legislature withholds power to contract, or permits the exercise of the power in a given case only in accordance with imposed restrictions, the corporation may no more bind itself by implied contract than by the forbidden express contract. All persons dealing with a municipal corporation are charged with notice of the limitations upon its power. Those limitations may not be exceeded, defeated, evaded or nullified under guise of implying a contract. A municipal contract let without competitive bidding when the statute requires competitive bidding, is void, *and no recovery may be had either upon the purported express contract or upon an implied contract to pay the*

reasonable value of the services or material furnished thereunder. * * * A meeting of the minds is as essential to the existence of a contract implied in fact as it is to an express contract. * * * Manifestly the making of a contract may not be implied in a case in which an express contract is forbidden. * * * 'it is fundamental doctrine that a contract which is violative of public policy is void and will not be enforced.' * * * To sustain the plaintiff's contention would be to permit one to obtain from a municipality an illegal contract for doing work impossible of return and by performing it enable him to recover the reasonable value of the services and materials furnished—to nullify the law by evasion and indirection and to recover the value of work done under a contract which the law prohibits." (Emphasis supplied.)

I have omitted the citations of authorities found in the opinion. The court distinguished cases which involved the "irregular exercise of conferred power" which did not involve the "total absence of power, or the exercise of assumed power in defiance of the express command of the legislature."

In Tobin v. Town Council of Town of City of Sundance, 45 Wyo. 219, 17 P. 2d 666, 84 A. L. R. 902, recovery was sought for the balance due for street improvements performed under a written contract. The defense was that the contract was void because of the amount involved and the failure to comply with a requirement to let the contract to the lowest bidder. The court held the contract to be void, relying on 2 Dillon, Municipal Corporations (5th ed.), § 801, p. 1197; 44 C. J., § 2185, p. 100; 3 McQuillin, Municipal Corporations (2d ed.), § 1283, p. 849; and 19 R. C. L., § 356, p. 1068. It then held that provisions such as were contained in its statutes "from the standpoint of both reason and authority alike, may not be regarded lightly and as merely formal and unimportant matters. They appear in those statutes generally, throughout the several states of the Union, which control the action of state and municipal officers who are

charged with the duty of expending public funds for necessary improvements, material, services, and the like. Unquestionably, they were devised and are so inserted to prevent favoritism, corruption, extravagance, and improvidence in the procurement of these things for the use of the state and its local self-governing subdivisions. Provisions of this kind must be so administered and construed as fairly and reasonably to accomplish their vitally important purpose. *Only by sternly insisting upon positive obedience thereto as mandatory provisions of law* have the courts found that the policy they uphold may be maintained. We deem it unwise to relax this policy, concededly an extremely valuable safeguard to the taxpayers of the municipalities of this state." (Emphasis supplied.)

The court then went to the contention of ratification, estoppel, and implied contract for the work and materials furnished. The court held: "Contentions of this character have been urged upon the courts of this country in a vast number of cases and, while in some jurisdictions there may be found decisions which support them, our search and study of the matter has led us to the conclusion that the weight of authority and reason alike is with that line of cases which decline to allow contentions of this character to succeed.

"Mr. McQuillin, in his work on the law of municipal corporations, has very well summarized his survey of the legal principles bearing on these points as follows:

" 'The doctrine which seems to harmonize with our governmental and legal system, which appears to be supported by reason, and which, therefore, should prevail may be thus stated briefly: If the charter or the statute applicable requires certain steps to be taken before making a contract, and it is mandatory in terms, a contract not made in conformity therewith is invalid, and ordinarily cannot be ratified, and usually there is no implied liability for the reasonable value of the property or services of which the municipality has had

the benefit. These provisions exist to protect the citizens and taxpayers of the municipality from unjust, ill considered, or extortionate contracts, or those showing favoritism, and if the municipality is suffered to disregard them and the other contracting party is, nevertheless, permitted to recover for the property delivered or the services rendered, either on the ground of ratification, estoppel or implied contract, then it follows as the night the day that the statute or charter provision can always be evaded and set at naught. Cases holding the contrary are usually based on the idea that it is unjust for a municipality to receive and accept the benefits of a contract and then turn around and defend an action to recover the contract price or the reasonable value, on the ground that the contract was not entered into as provided by statute or the charter, but it should be remembered that the other contracting party is charged with notice of the provisions of the statutes or charter in regard to contracting, and that the welfare and protection of the taxpayers and residents of the municipality is of more importance than the dispensation of justice to a private party in a particular case.' 3 McQuillin, Municipal Corporations (2nd Ed.), § 1266, p. 798-9.

"The same author further says, in Sec. 1283 of the volume last cited:

" 'The prevailing rule undoubtedly is that if the powers of a municipality or its agents are subjected by statute or charter "to restrictions as to the form and method of contracting that are limitations upon the power itself, the corporation cannot be held liable by either an express or an implied contract in defiance of such restrictions." '

"And in Sec. 1358 following appears this language:

" 'A municipality cannot be estopped to aver its incapacity to make a contract by receiving benefits thereunder. That is, it cannot be made liable either on the theory of estoppel or implied contract, where it had no

capacity to make the contract or where it was made in express violation of law. * * *

" 'A contract which violates an express provision of the law cannot be ratified, e.g., one not awarded by competitive bidding, as required, or one that must be upon a consideration wholly to be performed after the making of the contract, and to be in writing. Such invalid contracts cannot be ratified after performance.' "

The court then cited with approval and quoted from Johnson County Savings Bank v. City of Creston, *supra;* Frisbie Co. v. City of East Cleveland, 98 Ohio St. 266, 120 N. E. 309; and Bartlett v. City of Lowell, 201 Mass. 151, 87 N. E. 195. It denied relief to the plaintiff.

In Bechtold v. City of Wauwatosa, on rehearing, 228 Wis. 559, 280 N. W. 320, a contract for paving was held void because of failure to comply with a statute with reference to bids and the letting to the lowest responsible bidder where the estimated cost exceeded $500. The court held: "* * * a municipality has no power to make contracts for public improvements unless it proceeds in the manner prescribed by law, and that a contract entered into without complying with the charter provisions is void. * * * a contract void in its inception is not validated by performance and remains a void contract." The court further said that a failure to comply with every incidental provision of a statute might not necessarily invalidate a contract but "a failure to comply with those provisions which are essential to the accomplishment of the legislative purpose are in a different category."

The above decision was followed by Federal Paving Corp. v. City of Wauwatosa, 231 Wis. 655, 286 N. W. 546, where an attempt was made to recover the reasonable value of the paving. The court held: "(2) A municipality does not become liable for money, goods, or services upon principles of unjust enrichment where it is prohibited from contracting in any other than a specified way, as for instance, with the lowest bidder.

* * * (4) Where the municipality has power to do an act or enter into an obligation and is not prohibited from creating a liability in any but a specified way, it may become liable upon principles of unjust enrichment for moneys had and received, for services rendered, or for goods furnished. This is the converse of the situation set forth in (2), and relates to a situation where there is no prohibition against the creation of a contract in the way that it was sought to be created. * * * (8) Where the statute forbids the making of the contract by a municipality and the other party, the contract is illegal and there shall be no recovery upon principles of unjust enrichment."

The court then discussed certain authorities and continued: "Summarizing very briefly, it is evident that in many fact situations there is no good reason why a municipal corporation should avoid the duty of paying for benefits conferred in good faith under merely void or irregular contracts, and the courts have tended to impose this duty where the case involved nothing more than this. Where, however, the situation is that outlined in the following quotation from Woodward, Quasi-Contracts, p. 261, § 161, the great weight of authority denies a recovery in restitution:

" 'If the irregularity is such as to deprive the municipality of the protection of a safeguard against the extravagance or corruption of its officers—as a substantial failure to comply with a requirement that contracts shall be let to the lowest bidder after due publication of notice—recovery should be denied.'

"The matter is thus put in Restatement, Restitution, p. 241, § 62: 'A person otherwise entitled to restitution of a benefit conferred by mistake is disentitled thereto if restitution would seriously impair the protection intended to be afforded by common law or by statute to persons in the position of the transferee or of the beneficiary, or to other persons.'

"One of the illustrations to this section is as follows,

p. 243: 'In state X a statute provides that no contract for work to be done for a municipality where the contract price exceeds $10,000 shall be made unless it has been passed upon at regular session of the municipal council duly called. A contracts with the city of Y for dredging for the price of $50,000, the contract being approved only by the municipal officers. Upon completion of the work, A is not entitled to reasonable compensation from Y although he believed that the council had approved the contract or although he did not know of the statute.'

"* * * however harsh the result may appear to be, the decisions are sound in principle if there is to be effective enforcement of mandatory statutes and avoidance of the circumvention of statutory prohibitions. This principle also makes impossible application of the doctrine of estoppel as a means of binding a municipality. Where creation of a contract in any but a specified way is prohibited, the city may not by waiver, ratification, or acts ordinarily amounting to an estoppel give vitality to the prohibited contract or become bound upon the principles of restitution." Recovery was denied.

In conclusion on this feature of the case I refer to our decision in Fairbanks, Morse & Co. v. City of North Bend, 68 Neb. 560, 94 N. W. 537. There the plaintiff had made a bid for public improvements accompanied by a deposit of $200 to be forfeited if plaintiff failed to enter into the contract. As the situation developed we held that the bid was made on a proposal that was without compliance with the statute requiring advertising for bids. The plaintiff, refusing to enter into the contract, sued to recover the amount of the deposit. We held that the statute was mandatory, and that neither party was estopped to deny the legality of the proceedings. We permitted a recovery of the deposit on the theory that the parties had stopped short of the consummation of an illegal contract. We stated the rule that "* * * where one of the parties to an

illegal contract pays money thereon to the other, he may recover it back before the contract is executed, but not afterwards."

The reasoning threaded through all of these decisions is that if recovery is allowed on implied contracts that the salutary purposes of the statutes requiring competition and bidding on contracts of this character would be defeated and a mandatory statute, in effect, nullified.

And yet the court allows recovery "quantum meruit not exceeding the contract price."

That is done on the theory that the statute does not avoid the obligation of a contract made in a manner contrary to the provisions of the statute.

I have cited the mandatory provisions of the statute and the repeated decisions holding that such a statute makes the contract void and denying recovery either on quantum meruit or on contract.

But there is such a statute. It is sections 23-336, 23-337, and 23-338, R. R. S. 1943. The court cites it but does not quote it nor analyze it. It provides: *"All contracts, either express or implied,* entered into with any county board, for or on behalf of any county, and all orders given by any such board or any of the members thereof, for any article, service, public improvement, material or labor *in contravention of any statutory limitation,* or when there are, or were no funds, legally available therefor, or in the absence of a statute expressly authorizing such contract to be entered into, or such order to be given, are hereby declared unlawful and shall be wholly void as an obligation against any such county." § 23-336, R. R. S. 1943. (Emphasis supplied.)

"Any public official or officials who shall audit, allow or pay out, or cause to be paid out, any funds of any county for any article, public improvement, material, service or labor, contrary to the provisions of section 23-336, shall be liable for the full amount so expended, and the same may be recovered from any such official

or the surety upon his official bond by any such county, or any taxpayer thereof." § 23-337, R. R. S. 1943.

"No judgment shall hereafter be rendered by any court against any such county in any action brought to recover for any article, public improvement, material, service or labor contracted for or ordered in contravention of any statutory limitation, or when there are or were no funds legally available at the time, with which to pay for the same, or in the absence of a statute expressly authorizing such contract; Provided, that this section and sections 23-336 and 23-337 may not prevent the repairing of any bridge damaged by sudden casualty, when the county board shall first declare that an emergency exists, and give notice of its intention to repair such damage by at least one publication in some newspaper of general circulation in the county." § 23-338, R. R. S. 1943. (Emphasis supplied.)

The court says that statute relates to contracts "outside the scope" of delegated powers; it does "not relate to the illegal use of a granted power"; and "has no application where the county has general authority to make the contract but the power has been irregularly exercised."

The court here relies for its sole authority upon Bartlett v. Dahlsten, 104 Neb. 738, 178 N. W. 636. That was a claim by a physician based on contract to recover for services rendered in an emergency. Recovery was permitted *in part.* The authority for the decision rested upon the powers granted to county boards and state boards of health in the prevention of contagious diseases. The statute was then sections 2737 and 2738, Rev. St. 1913 (now as amended sections 71-501 and 71-502, R. R. S. 1943).

An examination of the statute reveals that as to the county it is one of general authority to counties to prevent contagious diseases. There is one exception to which I shall refer presently. There were no limitations, conditions, or provisos attached to the power.

The provisions as to the state Board of Health are of like general import. We held in the Bartlett case that while there was no provision in the act providing for the charging of expenses, "that liability must necessarily be inferred." The court then referred to section 1104, Rev. St. 1913 (now section 23-336, R. R. S. 1943), and questioned whether it "has any bearing on this case." It then used the language quoted herein by the court.

What application does it have here? The court there said that where there was a general power to do certain acts, liability to pay the expenses of exercising the power would be inferred. It is only by resorting to the general power construction of section 39-810, R. R. S. 1943, that this case can have any application at all. I have explored, and I think exploded, the general power construction of section 39-810, R. R. S. 1943. None of the provisos, conditions, or limitations, or "musts" found in section 39-810, R. R. S. 1943, exist in sections 2737 and 2738, Rev. St. 1913. The court ignores the distinction in the two acts.

There is one exception in section 2737, Rev. St. 1913, that requires notice—although the court ignores it. It is that the general powers of the county shall not extend to cities and villages having the power to establish boards of health and quarantine regulations. The court in the Bartlett case *denied recovery* for services to individuals resident in incorporated towns. Why? Because of the absence of the grant of power—and not because there was no provision of the statute that avoided the obligation. That denial rested on a lack of power in the county to incur the obligation.

Recovery in the Bartlett case was allowed as it was in Cheney v. County Board of Supervisors, *supra*, because there was a general power *with no statutory restriction on the exercise of the power.* In the instant case there are those mandatory restrictions on the exercise of the power. The court by its decision now holds them for naught except possibly to prevent the recov-

ery of the contract profits above resasonable value.

Do sections 23-336, 23-337, and 23-338, R. R. S. 1943, apply here?

The court says that the statute has no application where "the county has general authority to make the contract but the power has been irregularly exercised."

That is the ipse dixit of the court.

I examine first the history of the act and then our decisions construing and applying it.

The statute when passed was a new and not an amendatory act. Laws 1905, c. 55, p. 301. It is entitled "FOR AN ACT to prevent the illegal expenditure of public funds."

It was introduced in the Legislature by Senator Laverty who represented Saunders and *Sarpy* Counties.

Section 23-338, R. R. S. 1943, has a particular provision in a general act which excepts repairs to a bridge damaged by sudden casualty where there is a finding that an emergency exists and a notice of intention to repair is published. So somebody was thinking about bridges when this general act was passed.

It appears from the journal and the files in the Secretary of State's office that the bill as originally introduced applied to counties, cities, villages, and school districts and that the proviso above referred to was not a part of the bill as introduced.

The standing committee struck out everything after the enacting clause and reported the bill, limiting its operation to counties and putting in the proviso above referred to.

I have undertaken to find the background of the legislation. It appears from the briefs in the cases subsequently cited that a bridge was built across the river at Louisville by Cass County and one of its precincts. It got into disrepair.

In Dutton v. State ex rel. Pankonin, 42 Neb. 804, 60 N. W. 1042, Cass County by mandamus was required to repair the south half of the bridge.

State ex rel. Pankonin v. County Commissioners of Cass County, 58 Neb. 244, 78 N. W. 494, was a mandamus action to compel Cass County to repair the north half of the bridge. This was denied on the holding that the north half of the bridge was not in Cass but was in Sarpy County. That decision was filed on March 8, 1899.

In 63 Neb. 813, 89 N. W. 291, is the first of a series of opinions in County of Cass v. County of Sarpy.

That case was determined by the trial court on a demurrer. Cass County requested Sarpy County to enter into a joint contract for the repair of the bridge. Sarpy County refused. Cass County then had the bridge repaired and filed a claim with Sarpy County for one-half the cost. Sarpy County refused payment. An appeal was taken to the district court where a general demurrer was filed and sustained. On appeal on recommendation of the Commission (Department 3) the cause was reversed and remanded.

The statute involved is now as amended sections 39-827, 39-828, and 39-829, R. R. S. 1943. Sarpy County claimed that there had to be a contract under the statute before liability attached. The court held: "When a public bridge has been constructed across a stream dividing two counties, each county may be compelled, at the suit of the other, to contribute toward the expense of necessary repairs upon the same, although there may be no contract between the counties for the building or repair of the structure."

Cass County won the first round.

Sarpy County filed a motion for a rehearing.

A rehearing opinion is reported in 66 Neb. 473, 92 N. W. 635. Commissioner Ames wrote the majority opinion and in it expressed his dissenting views. The opinion recites that it had been urged that a consideration of other provisions of the statute "would be productive of a different result,"—and it was—temporarily!

The other provisions were sections 83, 84, and 85 of the code. Sections 4585, 4586, and 4587, Comp. St. 1901. They

became sections 5335, 5336, and 5337, Comp. St. 1903. As such they were repealed by an act in 1905. Laws 1905, c. 126, p. 539. The new act became sections 39-810 to 39-826, R. R. S. 1943,—the statute involved in this action. See history under section 39-810, R. R. S. 1943. So there became involved in this litigation the lineal ancestor of the present statute, section 39-810, R. R. S. 1943.

The opinion recites: "Sections 83, 84, 85 of the statute, *as construed by this court,* limit the power of counties to erect or repair bridges or approaches thereto, in instances in which the cost thereof shall exceed $100, by requiring contracts therefor to be let to competitive bidders after the adoption of the plans and specifications of the proposed works, and after notice of such letting by newspaper advertisement in a specified manner." Cass County v. Sarpy County, *supra.* (Emphasis supplied.) That is the construction for which I contend here.

Commissioner Ames stated the majority views with which he apparently disagreed. The opinion recites that "it was conceded that * * * a specific contract for the repairs in controversy had not been made" but were made pursuant to yearly contract for repairs. A majority of the commission, affirmed by the court, held that in order for plaintiff to recover, it was necessary to prove that the work was done pursuant to a specific contract, although Commissioner Ames held that it was "lawful work done in an irregular and unlawful manner." That is comparable to the view which the court now adopts.

As a result of that opinion the court receded from its earlier opinion and entered a judgment affirming the judgment of the trial court. The different result followed the consideration of what is now section 39-810, R. R. S. 1943.

Sarpy County won the second round.

Another motion for rehearing was filed—this time by Cass County.

A year later another opinion was filed, with Commissioner Ames again writing the opinion. 66 Neb. 476, 97 N. W. 352. The opinion recites that there was a diversity of opinion regarding the construction of sections 83 to 85, now section 39-810, R. R. S. 1943.

In between these two opinions Clark v. County of Lancaster, 69 Neb. 717, 96 N. W. 593, was decided. In the opinion in 66 Neb. 476, 97 N. W. 352, reference is made to Clark v. County of Lancaster and construed as holding that in the absence of a statute expressly or by necessary implication denying such right, one who furnishes labor and materials for the creation of a public work, in good faith, but in the absence of a contract such as is required by statute is entitled to recover their reasonable value.

The syllabus in the opinion in 66 Neb. 476, 97 N. W. 352, is: "One who furnishes labor and materials for the creation of a public work, in good faith, but in the absence of a contract such as is required by the statute, is entitled to recover their reasonable value, *in the absence of a statute expressly or by necessary implication denying such right.*" (Emphasis supplied.)

The judgment of November 19, 1902, was set aside and the judgment of the district court was reversed.

Cass County won that round.

Here I point out that the decision in the last opinion adopted the view now taken by the court "*in the absence of a statute expressly or by necessary implication denying such right.*"

A motion for rehearing was filed by Sarpy County and denied in an opinion reported in 72 Neb. 93, 100 N. W. 197, and filed June 9, 1904.

Then what happened?

At the opening of the next session of the Legislature, Sarpy County's representative introduced the bill that resulted in the enactment of what are now sections 23-

336, 23-337, and 23-338, R. R. S. 1943. The statute declared that "all contracts either express or implied" and "all orders" etc. were "unlawful" and "wholly void as an obligation against any such county."

This is a statute meeting the requirements of the opinion in 66 Neb. 476, 97 N. W. 352, "of a statute expressly or by necessary implication denying such right" of recovery. The statute went further and provided that recovery could be had against county officials for funds paid out contrary to section 23-336, and further that "No judgment shall * * * be rendered by any court against any such county" in the absence of a statute expressly authorizing such a contract. Obviously sections 23-336, 23-337, and 23-338 were enacted directly to overcome the result of the final opinions in Cass County v. Sarpy County.

What more could the Legislature do to provide a statute expressly or by implication denying a right of recovery on such contracts or claims as are here involved?

The court says here: "But where one is prohibited by statute from entering into a contract, and the *obligation of the contract avoided* for so doing, an action quantum meruit *cannot be maintained.*" (Emphasis supplied.)

I have here cited a statute, and its history, which the Legislature enacted specifically to overcome the court's construction of section 39-810, R. R. S. 1943, in the last of the Cass County v. Sarpy County cases.

Here I point out that in the recent case of Heese v. Wenke, 161 Neb. 311, 73 N. W. 2d 223, we held that: "* * * where there is a prohibition of power to contract coupled with a declaration of avoidance of obligation in the case of attempted exercise of power * * * there may be no recovery * * *." Here the only difference is that the statute of "avoidance of obligation" is an independent subsequent act, enacted for the specific purpose of meeting a situation such as we have here.

In the Wenke case the defendant was required to pay back because the statute avoided the obligation. Here

the statute says the obligation is wholly void—yet recovery by plaintiff is allowed.

It is to be remembered that the basis of liability against Sarpy County was what are now sections 39-827 to 39-830, R. R. S. 1943. The statute under which the liability was finally determined was what is now section 39-810, R. R. S. 1943. The Legislature sought, as it expressed it, to reach "all contracts, either express or implied," etc., hence used an independent bill and not one amendatory of either sections 39-827 to 39-830, R. R. S. 1943, or section 39-810, R. R. S. 1943.

Cass County v. Sarpy County, 90 Neb. 709, 134 N. W. 270, was an appeal involving this same matter. The cause was tried to a jury and judgment was for the defendant. We reversed and remanded.

Why?

Two contentions as to the sufficiency of the evidence were raised as to two separate issues. One was as to whether or not the bridge was a part of a public highway. The other was whether the bridge was repaired or a new one built. We held that if the verdict turned on the second fact question that it was not sustained by the evidence.

But the court held because "no special findings were submitted to and returned by the jury, it is impossible to say upon which of these two points the verdict of the jury was based. * * * Being unable, as above indicated, to determine upon what theory the jury returned their verdict, it should not, *in the face of the apparent merit of the plaintiff's claim,* be permitted to stand."

I quote this case here at the end of the Cass County series because it illustrates one of my objections to the "equivalent to the verdict of a jury" rule upon which the court relies. In this last Cass County case there were no special findings and there was no evidence to sustain one theory upon which the verdict might have rested. Because we were unable to determine upon what fact basis the jury's verdict rested, we reversed.

In the instant case there were "no special findings" by the court; it is "impossible" to determine upon what fact "theory" the trial court found for the plaintiff; nevertheless because the court finds some evidence that would sustain *a* theory upon which the trial court's finding possibly could rest, we affirm.

Under the rule stated in syllabus No. 1 here, had Cass County v. Sarpy County, 90 Neb. 709, 134 N. W. 270, been tried to the court without a jury resulting in a judgment for the defendant, it would have been affirmed "in the face of the apparent merit" of the claim. Consideration of evidence rules in this court that produce such diametrically opposite final results cannot be justified.

I now go to some of our decisions where sections 23-336, 23-337, and 23-338, R. R. S. 1943, have been involved and construed so far as important here.

It seems that Buffalo County and Kearney County have also had bridge troubles on a boundary river. See Buffalo County v. Kearney County, 95 Neb. 439, 145 N. W. 985. One was involved in Standard Bridge Co. v. Kearney County, 95 Neb. 744, 146 N. W. 943. It was claimed that the contract was void because it was let without advertising for bidders. It was stipulated that an emergency existed. It was held that whether or not an emergency existed was a serious question under the evidence but "in this court on appeal * * * the stipulation of facts is the only evidence that we can consider." There was a beautiful opportunity to have applied the "equivalent to a jury verdict" rule. But it was not applied. The court examined the controlling fact situation and held that advertisements for bids were not required because of the emergency. That rested on the proviso of section 23-338, R. R. S. 1943. It was further contended that there had to be at least one publication of notice of intent to repair. That question had not been raised in the trial court. We held: "A case on appeal rests upon the issues tendered and finally determined in the district court." I cite the case here

principally because of its bearing on the matters earlier discussed herein.

Gibson v. Sherman County, 97 Neb. 79, 149 N. W. 107, involved a claim for two items of bridge material totaling $512.24. No "bookkeeping practice" was involved. The claim was denied under section 23-336, R. R. S. 1943, in that there "were no funds legally available therefor." The Legislature then enacted Laws 1909, chapter 178, page 598, authorizing payment. The trial court denied the payment of the claim. On appeal here we held that the special act authorizing payment was constitutional, and reversed and remanded. The decision rests on the validity of the special act as removing "the bar to the remedy." The application of section 23-336, R. R. S. 1943, to this situation (comparable to the one here) was conceded—otherwise it would not have been necessary to get or for this court to rely on the special act.

Judge Letton, dissenting, went to the validity and purpose of sections 23-336, 23-337, and 23-338, R. R. S. 1943. He held: "The act of 1905 was evidently designed to put upon inquiry every person who thereafter dealt with a county board or board of supervisors as to the legality of the proposed contract. It was a direct notification that, unless the contract was authorized, was not in contravention of any statutory limitations, and there were funds legally available at the time, it should be 'wholly void as an obligation against said county.' The purpose of the statute is beneficial. In my opinion it should be obeyed by this court, as well as by all other courts in the state." Gibson v. Sherman County, *supra*.

Judge Letton in the conclusion obviously was referring to section 23-338, R. R. S. 1943, which bars a judgment "by any court" where material is contracted for in "contravention of any statutory limitations" as it was in the Gibson case and as it is here. The majority did not join issue with Judge Letton.

So far as matters such as are involved here are concerned, when the court's opinion here becomes final, the legal situation will be just where it was when Cass County v. Sarpy County was finally decided. The Legislature moved to correct the effect of that opinion. The act of 1905 is now put aside and is a nullity so far as matters of this kind are concerned. The situation is now as though that act had not been passed. The Legislature declared transactions such as this to be "void as an obligation" against a county; it declared that funds paid out could be recovered from the officers making the payments; and it provided that no court should render judgments against a county. These provisions were directed at "all contracts either express or implied, * * * in contravention of any statutory limitation, * * *." The Legislature did not say, "provided this act shall not be effective where granted powers have been 'irregularly exercised.'"

This court said that in the Cass County v. Sarpy County decisions. The Legislature in 1905 undertook to avoid such an avenue of escape from the effect of an "illegal or irregular" act. The court now again opens the avenue to liability.

The Legislature may once again enact a law "to prevent the illegal expenditure of public funds." I think doing so once should be sufficient, but evidently it is not so.

IN RE ESTATE OF MARY E. KNOTT, DECEASED.
MARGIE I. REYNOLDS, APPELLANT, V. RALPH KNOTT ET AL., APPELLEES.

82 N. W. 2d 568

Filed April 19, 1957. No. 34085.

1. Wills. A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein nor does it put any obstacle in the way of the aged or infirm

in making disposition of their property by will; provided, only, that their mentality conforms to the accepted tests at the time of the execution of such testamentary instrument and same was not procured by undue influence.

2. ———. In a will contest upon the ground of undue influence the burden is upon contestants to prove by a preponderance of evidence, which as a whole is of such a substantial nature as to contain some competent and relevant proof of each and all of the following elements: (1) That testator was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of such undue influence.
3. ———. Undue influence cannot be inferred from motive or opportunity alone. There must be competent evidence, direct or circumstantial, to show that undue influence not only existed but that it was exercised at the very time the will was executed.
4. ———. Mere suspicion, surmise, conjecture, or speculation is not enough to warrant a finding of undue influence, but there must be a solid foundation of established facts upon which to rest an inference of its existence.
5. ———. There may be influences directing the will-maker's attention to proper obligations which it might be thought ought to be satisfied by testamentary provisions. Such influences may be persuasive and effective, but so long as not coercive, they are not undue influence. Circumstances often arise where such conduct is proper and wholly justifiable.
6. ———. In order to invalidate a will duly executed by a testator having testamentary capacity, undue influence must be of such character as to destroy the free agency of the testator and substitute another's will for his own.
7. **Trial.** In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.
8. **Wills: Trial.** It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict for proponent.
9. **Trial.** To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury; it being sufficient that there is none that ought reasonably to

satisfy the jury that the fact sought to be proved is established.

10. **Parent and Child: Gifts.** It is well established in this jurisdiction that in the case of a gift and voluntary conveyance from a parent to his child or children, no presumption of fraud or undue influence arises as between the parties thereto by the mere fact of the relation.

11. ———: ———. The affection, confidence, and gratitude of a parent to a child which inspires the gift is a natural and lawful influence, and will not render it voidable unless this influence has been so used as to confuse the judgment and control the will of the donor.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded with directions.*

Munro & Parker, for appellant.

Cunningham & Cunningham and *Hamer, Tye & Worlock*, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

On November 12, 1954, Margie I. Reynolds filed a petition in the county court of Buffalo County, seeking probate of the last will and testament of Mary E. Knott, deceased. The will, executed July 7, 1950, first revoked all former wills, codicils, or testamentary documents made by testatrix, and directed payment of debts and funeral expenses. It then bequeathed in substance as follows: (1) $50 to her granddaughter, Marie Viola Knott, the daughter of a deceased son, Clyde E. Knott (such beneficiary was not directly a party in this case, and her married name and address were unknown); (2) $50 to each of her granddaughters, Betty Jean Brownell and Fern Lorraine Brasel, also known as Lorraine Brasel, daughter of a deceased son, Joseph Ray Knott; (3) $100 to her son, Louis Ralph Knott, also known as Ralph Knott; and (4) $100 to her grandson, Archie B. Keup, son of a deceased daughter, Lillian Viola Keup. There-

after the will of testatrix gave, devised, and bequeathed all the rest and residue of her estate, including all real and personal property of whatsoever kind and nature, to her only living daughter, Margie Irene Reynolds, and nominated and appointed George A. Munro, her lawyer, as executor.

Thereafter, Ralph Knott, Archie B. Keup, Betty Jean Brownell, and Lorraine Brasel filed objections to probate of the will, alleging that it was not executed as provided by law; that testatrix lacked testamentary capacity to execute it; and that its execution was procured by the undue influence of testatrix's daughter, Margie I. Reynolds, and others. Proponent's reply thereto admitted relationship of the parties to testatrix, and denied generally.

After hearing upon the merits the county court rendered judgment in favor of proponent and against contestants, admitted the will to probate, and appointed George A. Monro executor. Therefrom, contestants appealed to the district court, where, upon comparable new pleadings duly filed, like issues were tried to a jury. At conclusion of contestants' evidence, proponent moved for directed verdict substantially upon the grounds that there was no evidence: (1) That the will was not duly executed as provided by law; (2) that testatrix lacked testamentary capacity; and (3) that there was not sufficient competent evidence that the will was procured by the exercise of undue influence as alleged. Thereafter the trial court sustained such motion in part, concluding as a matter of law that the will was duly executed as required by law, and that testatrix had testamentary capacity. In such respect, concededly the record conclusively supports that finding and direction. However, that part of proponent's motion with regard to undue influence was overruled, and such issue was submitted to the jury for its determination, after the court had overruled proponent's motion again made at conclusion of all the evidence to

direct a verdict for proponent upon the ground that there was not sufficient competent evidence that the will was procured by the exercise of undue influence.

The jury thereafter returned a verdict in favor of contestants and against proponent, finding that the will was not the valid last will and testament of Mary E. Knott, deceased. Judgment was rendered accordingly, with costs taxed to proponent, whose motion for judgment notwithstanding the verdict, or in the alternative for new trial, was overruled. Therefrom proponent appealed to this court, assigning, insofar as important here, that the trial court erred in failing to sustain her motions for directed verdict upon the issue of undue influence made at conclusion of contestants' evidence and again at conclusion of all the evidence, and erred in overruling proponent's motion for judgment notwithstanding the verdict. We sustain the assignment. As we view it, the sole primary issue is whether or not there was sufficient competent evidence adduced by contestants to support a verdict of undue influence. We conclude that there was not. Hereinafter, we will designate Mary E. Knott as testatrix and all other parties generally by their first names except when necessary to designate them otherwise as proponent or contestants.

In In re Estate of Scoville, 149 Neb. 415, 31 N. W. 2d 284, we held: "A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein, nor does it put any obstacle in the way of the aged or infirm in making disposition of their property by will; provided, only, that their mentality conforms to the accepted tests at the time of the execution of such testamentary instrument." In other words, whether or not a testator was justified in making the provisions of a duly executed will is of no concern to the court, provided testator has testamentary capacity and the will was not procured by undue influence.

We have long established that in a will contest upon

the ground of undue influence the burden is upon contestants to prove by a preponderance of evidence each and all of the following elements: (1) That testator was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of such undue influence. Contrary to contestants' contention, we no longer recognize any exceptions to that rule. In re Estate of Hagan, 143 Neb. 459, 9 N. W. 2d 794, 154 A. L. R. 573; In re Estate of George, 144 Neb. 887, 15 N. W. 2d 80; Parkening v. Haffke, 153 Neb. 678, 46 N. W. 2d 117.

We have established as well that undue influence cannot be inferred from motive or opportunity alone. There must be competent evidence, direct or circumstantial, to show that undue influence not only existed but that it was exercised at the very time the will was executed. Mere suspicion, surmise, conjecture, or speculation is not enough to warrant a finding of undue influence, but there must be a solid foundation of established facts upon which to rest an inference of its existence. There may be influences directing the willmaker's attention to proper obligations which it might be thought ought to be satisfied by testamentary provisions. Such influences may be persuasive and effective, but so long as not coercive, they are not undue influence. Circumstances often arise where such conduct is proper and wholly justifiable. Also, in order to invalidate a will duly executed as provided by law by a testator having testamentary capacity, undue influence must be of such character as to destroy the free agency of the testator and substitute another's will for his own. In evaluating the testimony and proper inferences to be drawn therefrom, it is not always possible to apply the evidence tending to establish improper influence which is referable to the will solely to one of the essential elements. It is therefore permissible to rest the decision

upon whether or not the evidence as a whole is of such a substantial nature as to contain some competent and relevant proof of each of the essential elements, and require the issue of undue influence to be submitted to and determined by a jury. It is also the rule that in testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom. See, Horton v. Maruska, 158 Neb. 723, 64 N. W. 2d 734; In re Estate of Fehrenkamp, 154 Neb. 488, 48 N. W. 2d 421; In re Estate of Bainbridge, 151 Neb. 142, 36 N. W. 2d 625; Jensen v. Priebe, 163 Neb. 481, 80 N. W. 2d 127; In re Estate of Scoville, *supra.*

In the last-cited case, quoting with approval from In re Estate of Inda, 146 Neb. 179, 19 N. W. 2d 37, and In re Estate of Frazier, 131 Neb. 61, 267 N. W. 181, we said: " 'It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict.' * * *

" 'To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury; it being sufficient that there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.' " See, also, In re Estate of Benson, 153 Neb. 824, 46 N. W. 2d 176.

In Parkening v. Haffke, *supra,* cited with approval in Eggert v. Schroeder, 158 Neb. 65, 62 N. W. 2d 266, we held: "The rule is well established in this jurisdiction, in a case of a gift and voluntary conveyance from a parent to his child or children, no presumption of fraud

or undue influence arises as between the parties thereto by the mere fact of the relation.

"The affection, confidence, and gratitude of a parent to a child which inspires the gift is a natural and lawful inference, and will not render it voidable, unless this influence has been so used as to confuse the judgment and control the will of the donor."

Also, in In re Estate of Bose, 136 Neb. 156, 285 N. W. 319, quoting with approval from Isaac v. Halderman, 76 Neb. 823, 107 N. W. 1016, we said: " 'Courts and juries are not warranted in setting aside last wills and testaments, and substituting in lieu thereof their own notions as to what a testator should do with his property, except upon satisfactory evidence. No right of the citizen is more valued than the power to dispose of his property by will. No right is more solemnly assured to him by the law. Nor does it depend in any sense upon the judicious exercise of that right. It rarely happens that a man bequeaths his estate to the entire satisfaction of either his family or friends. The law wisely secures equality of distribution where a man dies intestate, but the very object of a will is to produce inequality and to provide for the wants of the testator's family, to protect those who are helpless, to reward those who have been affectionate, and to punish those who have been disobedient. In this country a man's prejudices form a part of his liberty. He has a right to them. He may be unjust to his children or relatives. He is entitled to the control of his property while living, and by will to direct its use after his death, subject only to such restrictions as are imposed by law. Where a man has sufficient memory and understanding to make a will, and such instrument is not the result of undue influence, it is not to be set aside without sufficient evidence, nor upon sentimental notions of equality.' " That statement has particular application in the case at bar.

In the light of the foregoing rules, we have examined the voluminous record to determine whether or not the

evidence of contestants was sufficient to support a verdict in their favor upon the issue of undue influence. In doing so, we conclude that it was not.

In that connection, the record as summarized substantially discloses the following: Testatrix was 82 years old when she died in a hospital in Omaha on November 7, 1954, some 4 years and 4 months after execution of her last will and testament on July 7, 1950. She was a large woman, of sound mind and excellent mental capacity at all times until her death. However, she was badly crippled with arthritis which progressively grew worse, making it difficult for her to get around, particularly up and down stairs. From about 1940 until 1952 she lived alone most of the time in a little home in the north part of Gibbon. She had purchased same after her husband's death with funds received from the sale of personal property on an 80-acre farm here involved which she then owned and had rented to a satisfactory tenant. The title to her home in Gibbon was taken in the name of testatrix and her only living daughter, Margie I. Reynolds, as joint tenants with right of survivorship so that Margie would have a home if she did not make a go of it with her husband, Ray Reynolds, with whom testatrix was not even on speaking terms until several years after their marriage in 1933. However, often during the ensuing years testatrix visited with Margie, who lived in Fairbury for a time, then moved to Omaha. Testatrix spent a part of some summers and usually spent all of her winters with Margie, but returned in the spring to make out her income tax and prepare her home at Gibbon for summer occupancy. Also, Margie often came out to Gibbon to visit and care for testatrix, because other relatives failed and neglected to do so.

Naturally and by reason of necessity because there was no one else with whom she could counsel or advise, she discussed some of her problems with and sought advice about them from Margie and a real estate man

in Gibbon who was her neighbor and a close personal and business friend for many years. He testified as a witness for contestants that he thought testatrix was prone to and would sometimes because of such necessity listen to Margie's advice or his own if she were at a loss to know what to do, and asked for it, provided it was not anything wrong or evil, but she had a rather strong mind and followed her own wishes if she disagreed.

In that connection, from 1949 to 1952, testatrix gradually became so crippled with arthritis and disabled from dropsy that she could no longer live alone and take care of herself. She then of necessity turned to Margie who was the only member of her family who would take care of her, and she wanted Margie to look after her business affairs. In that situation, in 1952 testatrix reluctantly sold her furniture, broke up housekeeping, closed and rented her home in Gibbon, and went to live with Margie in Omaha. In or just before 1954 her old farm tenant had bought a farm of his own, so at request of testatrix she was brought back to Gibbon by Margie to meet and visit with a new tenant on her farm in order to determine whether or not he would be a satisfactory tenant.

In the meantime, during 1943 Ralph Knott, the only living son of testatrix, who was a contestant here, bought and moved into a home at Gibbon. It was located a block west of the home of testatrix, with only one house separating them. Ralph and his wife, Marie, had cared for testatrix once when she was ill for a period of time in 1942, and testatrix made the down-payment on that home for them where they lived in Gibbon until 1948 when they moved out on a farm north of Gibbon. From 1943 until about 1946 or 1947 they and their family were generally friendly with testatrix. However, at about that time, Ralph evidently wanted to replace the satisfactory farm tenant of testatrix and move out on her farm. She did not consent to that, and hard feelings

resulted for which, as a conclusion without any factual foundation, he blamed Margie.

In 1947 testatrix fell while crossing an alley near her home and was severely injured, as a result of which she was confined to her bed 3 or 4 days and then could sit up in a rocking chair part time but needed nursing care and attention for about 3 weeks or more. Although Ralph and his wife were notified at once of her accident and injuries neither of them ever came to see testatrix, which caused her great grief and anxiety. During such period and for sometime thereafter near neighbors and friends nursed, cared for, and fed testatrix until she recovered. As a matter of fact, concededly Ralph never went to see, talked with, or wrote to his mother, the testatrix, during 1947, 1948, 1949, and 1950, which was a constant source of grief and anxiety to testatrix. He claims that he saw her once in 1951 when he invited her to dinner, but she did not come. Concededly, he went once to her home in 1952 when she was selling her furniture and breaking up her housekeeping in order to go and live with Margie in Omaha. However, concededly while there, with loud and profane language addressed to Margie and Ray, he questioned the right to sell her furniture without his permission or a court order, and tried to stop the sale. From that moment until her death neither he nor his wife ever wrote to testatrix or saw her again even during her last illness and death in 1954, although they were informed of it. Ralph claimed that once in 1952 or 1953 he went to Omaha to see her but she had then gone back to Gibbon and neither he nor his wife ever thereafter wrote to her or made any further effort to see her again during her lifetime. Further, on September 25, 1947, and again on September 16, 1950, Ralph's wife Marie wrote testatrix insulting letters framed with hatred, seeking to shame testatrix and prejudice her against Margie, against the farm tenant of testatrix, and against the family of Archie B. Keup, grandson of testatrix, who is a contestant here.

Marie testified that in 1946 or 1947 testatrix had told her that she wanted to divide her property equally but she didn't want certain granddaughters to have anything.

Ralph, his wife, and Archie all testified that about 1946, 1947, or 1948, testatrix told them that Margie and Ray had wanted her to will the farm to them, then come to live with them, and they would take care of her for the rest of her life, but she wanted to divide her property equally except as aforesaid, and not live with any of her children. They testified also that about that time testatrix wanted to trade her home for another more modern, fairly new one in Gibbon, but Margie advised against it because it involved too much money. In that connection, they knew nothing about the terms of the transaction or whether it was a good or bad deal, and it will be remembered that Margie was a joint owner of the home in which testatrix lived, and had a perfect right to counsel and advise her with regard to the transaction. She also advised against it because the other house involved was a two-story, or one and one-half story, house with two rooms upstairs, and a basement with cellar steps which testatrix could not climb because of her physical condition. On the other hand, the home in which she lived was comfortable with only a couple of steps to enter it. It also had a basement where she kept vegetables and fruits, but generally when necessary either the neighbors or children of Ralph or Archie traversed cellar steps for her.

Ralph and his wife testified that about the time testatrix wanted to procure the new home she also wanted to purchase a new bedroom suite and a decorative bronze horse which she admired, but Margie advised otherwise, saying that testatrix did not need them. However, she bought them anyway.

Archie, a grandson, lived with testatrix and her husband out on the farm from the time he was 4 years old until he was out of high school in 1929, when he left and,

after working around a couple of years, moved to Peru, Nebraska. He saw testatrix only 3 times from 1931 to 1942 when he finally moved back to Gibbon, and lived in a home about 2 blocks from testatrix, who made the down-payment on that home for him. From that time he saw testatrix quite often except while he was away for several months at different times. After 1952 he saw her but once in May 1954 while she was seriously ill at Margie's home in Omaha. Before 1952 some of his 10 children, 8 of whom lived at home, saw testatrix often and helped her when necessary. Also, he sometimes took testatrix about in a car when she wanted to go.

Archie testified that in the summer of 1949 he saw a typewritten copy of a will allegedly made by testatrix which, if he remembered correctly, gave him one-third, Margie one-third, and Ralph one-third of her property, with a bequest of money to some other grandchildren. Ralph's share as he remembered it was put in trust so that he would receive $100 a month as long as his share lasted, but if Ralph or Margie died before testatrix, their share went to Archie's children who were the great grandchildren of testatrix. No such will appears in the record, although it was conceded that on February 22, 1949, testatrix had made a prior will.

Archie also testified that in 1950 he talked to Margie who said that testatrix was failing in health, and they were going to have to move someone in with her in order to take care of her, but he objected to that because she always was a very independent person who transacted her own business and wanted to take care of herself. He also testified that on July 8, 9, or 10, 1950, testatrix, Margie, and Ray came in a car over where he was working, at which time testatrix was crying and said that since she could not take care of herself any more, she guessed she would have to live with Margie, and he replied that it was all right to do that.

Archie testified further that sometime about 1947 or 1948 testatrix told him that her farm tenant wanted her

to put in a hot water system, then leave it as part of the farm. The tenant also wanted her to put in some posts for a corral, and shingle the barn and corn crib. However, Margie advised her that it would be a waste to spend her money for such improvements out of her income from the land without getting any greater return from it. Nevertheless, testatrix made some of such improvements. In that connection, it would seem logical that if Margie was using undue influence to get the farm, as claimed, it would have been good judgment for her to have advised testatrix to make such improvements out of her income therefrom so that Margie could eventually have a better and more valuable farm at her mother's expense.

There is evidence that Archie drank excessively and spent his money for intoxicating liquor instead of for the care and support of his family and children, who were in a deplorable condition without proper food and clothing, which disturbed and worried testatrix, so she sewed for them, gave them food, and paid them small sums of money for services rendered for her. Archie testified that after the death of testatrix, and the will had been read to the family, Margie, using his nickname, said: "'Ikey, I suppose there'll be a big stink raised over this. * * * if you'll just stick with me and meet me half way I'll see that you're taken care of.'" In that connection, we cannot see how, under the provocative circumstances presented in this case, such a statement tended in any manner to prove that the will of testatrix was procured by undue influence.

Another witness for contestants testified by deposition. She was formerly the wife of Joseph Ray Knott, a deceased son of testatrix, who was the father of contestants, Betty Jean Brownell and Lorraine Brasel. She was a school teacher who left Nebraska and went to California in 1945 or 1946, but generally returned for short visits with testatrix and others in Gibbon during summer vacations. She testified that she was not in-

terested in getting any money from the estate for her daughters but she felt sorry for Ralph and Archie, had contributed $100 which they needed, and was doing her best in order to help them carry on and win this litigation. She was not sure when it occurred, but testified that on several occasions testatrix had told her Margie and Ray wanted testatrix to will her farm to them, then come to live with them, and they would take care of her for the rest of her life, but she wanted to leave her property equally and not live with any of her children. In that connection, she also testified that testatrix was a rather strong-willed person and did not once part with any of her property while living, except when she had helped different ones at times.

Contrary to contestants' contention, we find no competent evidence adduced by them from which it could be reasonably concluded that from 1946 until the death of testatrix, Margie ever neglected, failed, or refused to give her necessary loving care and attention when contestants refused or failed and neglected to do so.

We come then to the manner of execution of the will. In that connection, due execution thereof was properly disposed of as a matter of law, but we summarize the undisputed evidence with regard thereto for whatever bearing it may have if any upon the issue of undue influence. A short time before July 7, 1950, testatrix wrote Margie telling her that she had some legal business to transact with her lawyer, George A. Munro at Kearney, and asking if Margie and Ray would come to Gibbon and take her there. In response, they came on July 6, 1950, and took testatrix to her lawyer's office on July 7, 1950. His office was located on the second floor up a long stairway. They arrived about midmorning, without prior appointment, and assisted testatrix up the stairs to her lawyer's office. There, and before that, she said that she had to have somebody appointed to look after her affairs because she was no longer able physically to get around and do so, and she

requested Margie to act in that capacity. Thus in her lawyer's office, as advised by her lawyer and at request of testatrix, conservatorship papers were first drawn, then executed by testatrix, and Margie was duly appointed by the county court. Contrary to contestants' contention, such proceedings, as shown by contestants' evidence, appear to have been regular in every material respect. Thereafter, Margie acted as conservator from July 7, 1950, until June 14, 1955, when, over objections of contestants here to her final account and report, which were overruled, she was discharged by the county court in an order which became final, reciting in substance that she had in all things faithfully and fully performed and discharged all and singular her duties and obligations imposed upon her by law and orders of the court, and had duly and fully acted for and administered all of the estate coming into her possession as conservator.

After conservatorship papers were drawn and executed, testatrix told her lawyer, " 'I want to change my will.' " Her lawyer then told Margie and Ray to leave and let him talk to testatrix alone in his private office. They then did leave, and while alone in her lawyer's office her will here involved was prepared as directed by testatrix. It was then read to her, and after approval of its provisions, her will was duly executed in every respect as provided by law. Margie and Ray knew of its execution but did not know its contents. They came back to the lawyer's office about 3:30 p. m., helped testatrix down the stairs, and later drove back to Gibbon with her.

Contestants lay particular stress upon the fact that testatrix stayed in her lawyer's office alone for lunch which Margie had brought up to her, but we see nothing unusual or wrong with that fact since it is clear that she stayed there simply because her business transactions had not yet been completed and she was physically unable to get up and down the long stairway again.

As we view it, there was opportunity for Margie and Ray to exercise undue influence. On the other hand, there was no sufficient competent evidence adduced by contestants that testatrix was a susceptible person who would be subject to undue influence or that there was a disposition by Margie and Ray to exercise undue influence for any improper purpose, and under the unusual circumstances presented in this case, the result was a natural one which did not clearly show the effect of undue influence. No presumption of fraud or undue influence arose simply because Margie was the daughter of testatrix, since the affection, confidence, and gratitude of testatrix to her was, under the circumstances heretofore recited, a natural and lawful influence, unless it had been used to confuse the judgment and control the will of testatrix, which contestants failed to establish by sufficient competent evidence. Further, as conservator from July 7, 1950, until the death of testatrix, Margie had a right and duty to counsel and advise with her as she did, and in such respect Margie was subject to the orders of the county court at all times.

For reasons heretofore stated, we conclude that the trial court should have sustained proponent's motion to direct a verdict for proponent upon the issue of undue influence made at conclusion of contestants' evidence. Therefore, the verdict and judgment of the trial court were clearly wrong and the judgment should be and hereby is reversed and the cause is remanded with directions to sustain proponent's motion for judgment notwithstanding the verdict, and render judgment accordingly for proponent and against contestants. All costs are taxed to contestants.

REVERSED AND REMANDED WITH DIRECTIONS.

HULDA BURHOOP, APPELLEE, V. WAYNE BRACKHAN, APPELLANT.

82 N. W. 2d 557

Filed April 19, 1957. No. 34094.

1. **Automobiles.** Ordinarily a guest passenger in an automobile has the right to assume the driver thereof is a reasonably safe and careful driver and a duty to warn the driver does not arise until some fact or situation out of the usual and ordinary is presented.
2. **Torts.** Where independent tortious acts of two persons combine to produce an injury indivisible in its nature either tortfeasor may be held for the entire damage, not because he is responsible for the act of the other but because his own act is regarded in law as a cause of the injury.
3. **Automobiles: Negligence.** Where the negligence of the driver of an automobile, in which a person is riding as a guest, is the sole proximate cause of a collision in which the guest is injured the guest cannot recover from a third person for such injury.
4. **Trial.** Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury.
5. ———. If there is any evidence which will sustain a finding for the party having the burden of proof in a cause the trial court may not disregard it and direct a verdict against him.
6. **Automobiles.** A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored car to exercise ordinary care to avoid an accident.
7. ———. The duty of the driver of an automobile about to enter a street intersection to look for automobiles approaching the same intersection implies the duty to see that which was in plain sight, unless some reasonable excuse for not seeing is shown.
8. **Trial.** In stating the issues of fact in its charge to the jury the court should submit to the jury only such issues as are in controversy under the pleadings and which find support in the evidence.
9. ———. It is for the triers of fact to decide any issue upon all of the evidence adduced, and this is true even when the more favorable evidence relied on by a party to overcome the effect of his own self-injurious statement is found in his own testimony.
10. **Case Overruled.** Insofar as McCleneghan v. Powell, 105 Neb.

306, 180 N. W. 576, is in conflict with syllabus 9 hereof the same is overruled.

APPEAL from the district court for York County: H. EMERSON KOKJER, JUDGE. *Reversed and remanded with directions.*

Wallace W. Angle, for appellant.

Kirkpatrick & Dougherty, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for York County. It involves an action wherein Hulda Burhoop sued Wayne Brackhan to recover damages resulting from injuries which she allegedly suffered in a car accident which, she claims, resulted from negligent conduct on the part of Brackhan. A jury returned a verdict in favor of Brackhan. Plaintiff thereupon filed a motion to set aside this verdict and for a new trial. The trial court sustained this motion, set aside the verdict, and granted plaintiff a new trial but gave no reason for doing so. It is from this order that this appeal was taken.

For convenience we shall herein refer to the parties as they appeared in the district court, that is, to appellant as defendant and to appellee as plaintiff.

The rule applicable here is stated in Gain v. Drennen, 160 Neb 263, 69 N. W. 2d 916, as follows: "In an action where the trial court has sustained a motion for a new trial without assigning reasons therefor, appropriate procedure on appeal is for the appellant to bring the record here with an assignment that the court erred in granting a new trial and submit it for critical examination. The duty then devolves upon the appellee to point out the prejudicial error which he contends justifies the granting of a new trial."

In this respect we said in Anderson v. Nielsen, 162

Neb. 110, 75 N. W. 2d 372, that: "Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured."

Plaintiff primarily contends the trial court erred in failing to take all questions of negligence away from the jury and submitting only the issue as to the amount of damages on the basis that defendant was, as a matter of law, guilty of negligence which was a proximate cause of the accident and resulting injuries to her.

It is true, as plaintiff contends, that she was, at the time of the accident, riding as a guest in a car being driven by her daughter, Gladys Naber, and consequently any negligence of her daughter could not be imputed to her. See Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757. Nor, under the factual situation as developed by the evidence adduced, can it be said she could be found guilty of any conduct constituting negligence which contributed to the accident and resulting injuries. See Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466. As stated in Bartek v. Glasers Provisions Co., Inc., *supra:* "Ordinarily, the guest passenger in an automobile has a right to assume that the driver is a reasonably safe and careful driver; and the duty to warn him does not arise until some fact or situation out of the usual and ordinary is presented."

If, as plaintiff contends, defendant was guilty of any negligence that was a proximate cause of the accident then he could be liable for, as stated in Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569: "Where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tortfeasor may be held for the entire damage—not because he is responsible for the act of the other, but because his own act is regarded in law as a cause of the injury." See, also, O'Neill v. Rovatsos, 114 Neb. 142, 206 N. W. 752; Daniel-

sen v. Eickhoff, 159 Neb. 374, 66 N. W. 2d 913; Fick v. Herman, 161 Neb. 110, 72 N. W. 2d 598.

"Negligence is the doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances." Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710.

"Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred." Shupe v. County of Antelope, *supra.*

The trial court submitted the issue, pleaded by the defendant, that any injuries or damages sustained by plaintiff were solely and proximately caused by negligent acts of Gladys Naber, the driver of the automobile in which plaintiff was riding as a guest. If there is evidence to support this issue then, of course, it was proper for the court to submit it and, based thereon, it would be proper for a jury to find for defendant. See, Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673; Shiers v. Cowgill, 157 Neb. 265, 59 N. W. 2d 407; Ricker v. Danner, 159 Neb. 675, 68 N. W. 2d 338. As stated in Bergendahl v. Rabeler, *supra:* "Where the negligence of the driver of an automobile in which plaintiff is riding as a passenger is the sole proximate cause of a collision in which plaintiff is injured, plaintiff cannot recover from a third person for such injury."

"In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." Remmenga v. Selk, *supra.* The same would be true with reference to a motion for a directed verdict or for judgment notwithstanding the verdict. See Stark v. Turner, *supra.*

"Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury." Griess v. Borchers, 161 Neb. 217, 72 N. W. 2d 820.

"If there is any evidence which will sustain a finding for the party having the burden of proof in a cause the trial court may not disregard it and direct a verdict against him." Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496.

"The verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong." Griess v. Borchers, *supra.*

It is only "Where the verdict of a jury is clearly against the weight and reasonableness of the evidence, (that) it will be set aside and a new trial granted." Bentley v. Hoagland, 94 Neb. 442, 143 N. W. 465. See, also, Stewart v. City of Lincoln, 114 Neb. 362, 207 N. W. 511.

The accident wherein plaintiff was injured happened sometime between 4:45 and 5:30 p.m. on Monday, August 24, 1953, in the intersection of two country roads at a point 1 mile west and 2 miles south of Waco, in York County. It occurred when the front of a 1950 Tudor Ford, being driven by defendant, ran into the left side of a 1949 Buick sedan, being driven by Gladys Naber and in which plaintiff was riding as a guest. As a result of the impact the Ford came to an immediate stop, although the front end thereof was shoved toward the east. It remained upright and came to a stop, facing southeast, at a point in about the center of the intersection. The defendant was not hurt. The Buick, after the impact, continued on in a southeasterly direction some 54 feet and finally stopped in the ditch at the southeast corner of the intersection. It came to rest on its top with the front end facing to the north-northeast. It was in the ditch located along the south side of the east-west road. Plaintiff was thrown out of the car and apparently severely injured.

The roads creating the intersection were of equal dignity, the intersection being unprotected by signs of any kind. Just south of the intersection, on the east side of the traveled portion of the north-south road, was a sign advising the traveling public that the road to the south of the intersection was closed. However, the road to the south was not completely unusable and that fact was known to the defendant. The roads were dry, the sun was shining, and visibility was good.

Defendant, at the time, was driving south on the north-south road. This road is graveled north of the intersection. It had a 17-foot surface for travel on which the public had been driving down the center. Gladys Naber, at the time, was driving east on the east-west road. This road is graveled west of the intersection. It had a 16-foot surface for travel on which the public had been driving down the center. To the northwest of the intersection was a cornfield some 5 to 6 feet in height and at the corner were weeds some 4 to 5 feet in height. This created a blind northwest corner of which fact both drivers were fully aware, both being familiar with the road. However, back some 200 feet north of the intersection on the north-south road was a knoll from which cars could be observed traveling on the east-west road west of the intersection. From this knoll the north-south road slopes down slightly to the intersection. Likewise there is a knoll west of the intersection on the east-west road from which cars could be observed traveling on the north-south road north of the intersection. It is back about 500 feet. From this knoll the east-west road slopes down toward the intersection at about 20 degrees.

Gladys Naber, driver of the Buick, testified that as she approached the intersection from the west she was traveling between 35 and 40 miles an hour at the knoll some 500 feet to the west of the intersection; that she was familiar with the road and knew the intersection was dangerous so slowed her speed as she approached it

but did not apply her brakes; that she did not think anybody would be coming very fast from the north because of the fact that the road to the south was closed; that as she approached and entered the intersection at 30 miles an hour she first looked to the east and saw nothing, then looked to the south and saw the "road closed" sign of which she had previous knowledge, and then looked to the north when she saw the defendant's car just as it was about to hit her car; and that the car she was driving was hit on the left side when she was over half way across the intersection. She also testified she looked to her left, or north, when she first approached and entered the intersection but saw nothing coming from that direction.

Defendant testified that as he approached the intersection from the north he was traveling about 40 miles an hour as he came over the knoll; that he was intending to cross the intersection and go on south; that when he was about 140 to 150 feet from the intersection he was looking to the west and thought he saw a car or something on the west road; that he was then going about 35 miles an hour; that he immediately applied his brakes; that his car, including the brakes, was in good mechanical condition; that the application of his brakes caused the tires of his car to skid on the gravel; that he kept his brakes on and kept looking for the car on the west road; that he continued to look to the west and when he reached a point some 30 to 40 feet north of the intersection he thought he saw a car some 50 feet or so west of the intersection; that as he reached a point where he could see past the weeds located in the northwest corner he saw the Buick; that he continued to apply his brakes; that his car entered the intersection at a very reduced speed but he could not get it completely stopped before it hit the left side of the Buick at about the center thereof, although he had skidded his tires up to the point of impact, a distance of some 92 feet; that his car had very little forward movement

at the time the impact occurred; that the front of his car was shoved to the left as a result of the impact, but remained upright; and that it came to a stop a little past (south) the center of the intersection, facing southeast.

It is the plaintiff's thought that since the Buick approached the intersection from the right, and since the defendant admits it approached and entered the intersection first, that therefore the driver of the Buick had the right-of-way and defendant was guilty of negligence as a matter of law which was a proximate cause of the accident when he entered the intersection and ran into the side of the Buick car. It is true that defendant admitted the Buick was first in the intersection, although he also testified that the car he was driving was first to enter the intersection. There were facts and circumstances testified to that would justify a jury in finding that defendant's car entered the intersection first. However, for the purpose of the following discussion, we shall assume that the driver of the Buick had the right-of-way.

"In an action for damages for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it." Hansen v. Henshaw, 163 Neb. 191, 79 N. W. 2d 15.

Even though the driver of a car has the right-of-way at an intersection he still has duties in regard to other cars which are approaching and entering it at about the same time.

"A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored car to exercise ordinary care to avoid an accident." Wendel v. Carlson, 162 Neb. 742, 77 N. W. 2d 212.

"The driver of an automobile, upon reaching an in-

tersection, has the right of way over a vehicle approaching on his left, and may ordinarily proceed to cross; but if the situation is such as to indicate to the mind of an ordinarily prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent accident, even to the extent of waiving his right." Thrapp v. Meyers, 114 Neb. 689, 209 N. W. 238, 47 A. L. R. 585.

When a driver of an automobile approaches or enters an intersection of two roads he is obliged to timely look for approaching vehicles and to see those within that radius which denotes the limit of danger. Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405; Elliott v. Swift & Co., 151 Neb. 787, 39 N. W. 2d 617.

"The duty of the driver of a vehicle about to enter a street intersection to look for vehicles approaching the same intersection implies the duty to see that which was in plain sight, unless some reasonable excuse for not seeing is shown." Bergendahl v. Rabeler, *supra*. See, also, Evans v. Messick, 158 Neb. 485, 63 N. W. 2d 491.

"One is required only to have his car under such reasonable control as to be able to avoid a collision with other vehicles whose drivers exercise due care. Complete control which is such as will prevent collision by the anticipation of negligence on the part of another in the absence of warning or knowledge is not required." Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669.

"Users of the highway are required to exercise reasonable care. What is reasonable care must in each case be determined by its own peculiar facts and circumstances." Lammers v. Carstensen, 109 Neb. 475, 191 N. W. 670.

We find the evidence adduced does not, as a matter of law, establish that defendant was negligent in the operation of his car. Under the facts disclosed by the record we think that reasonable minds could differ as to whether or not he was negligent and, if so, whether or

not such negligence was a proximate cause of the accident. In view thereof both are issues for the jury and the trial court was correct in submitting them.

The defendant pleaded that plaintiff's injuries were caused by negligent acts of Gladys Naber which were the sole and proximate cause thereof, setting out six specific items of negligence of which he claims she was guilty and which he claims were the proximate cause of the accident. The trial court submitted this issue, and we think properly in view of the evidence adduced, although we do not approve the instruction by which it was done.

Instruction No. 2 presented the issue of sole proximate cause, as pleaded, to the jury. It is as follows: "Defendant filed an answer in which he denied every material allegation in said petition and in which he alleged that any injuries or damages sustained by plaintiff were solely and proximately caused by the negligent acts of Gladys Naber, the driver of the automobile in which plaintiff was riding in that: 1. She failed to keep and maintain a proper lookout as she approached said intersection. 2. That she failed to keep her automobile under control. 3. That she was familiar with the road upon which she was traveling as well as the said intersection and knew or should have known that the intersection which they were about to enter was obstructed by weeds and growing corn but that despite such knowledge she failed to slacken the speed of her automobile as she approached said intersection or to make any observation of defendant's automobile until it was in the intersection itself. 4. That she operated her automobile at such a high, careless and negligent rate of speed that she could not control it nor stop nor turn aside in an attempt to avoid an accident with the automobile driven by defendant. 5. That she failed to grant defendant the right-of-way across the intersection, the defendant being in the intersection first. 6. That said accident was due entirely to the negligent conduct of the driver of

the car in which plaintiff was riding and was unavoidable insofar as the defendant is concerned. The defendant therefore asks that the petition of plaintiff be dismissed and her claims be denied."

By instruction No. 5 the trial court advised the jury that the issue of sole proximate cause of the accident, as it relates to Gladys Naber, was an affirmative defense and in order for the defendant to relieve himself of liability by reason thereof the burden of proof was upon him to prove that fact by the greater weight of the evidence. It is not an affirmative defense. See, Umberger v. Sankey, 151 Neb. 488, 38 N. W. 2d 21; Styskal v. Brickey, 158 Neb. 208, 62 N. W. 2d 854; Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333. As stated in Styskal v. Brickey, *supra:* "Such defense is not an affirmative plea in avoidance of appellee's cause of action and imposes no burden of proof upon appellant with relation thereto but is one entirely consistent with and provable under the general issue. However, some place in the instructions the jury should be advised that if it should find the sole proximate cause of the accident in which appellee was injured was the negligence of the driver of the car in which she was riding then its verdict should be for the appellant."

Although the court was in error in placing this burden on defendant it could work no prejudice to the plaintiff and consequently she is not in a position to complain thereof.

In relation to the six specifications of negligence which defendant alleged Gladys Naber was guilty of they must each find support in the evidence or otherwise it was prejudicial error for the court to have submitted them for, as stated in Koehn v. City of Hastings, 114 Neb. 106, 206 N. W. 19: "In stating the issues of fact in its charge to the jury, the court should submit to the jury only such issues as are presented by the pleadings and are in controversy, and which find some support in the evidence." We shall therefore examine the record with

reference to each of the specifications of negligence set out in instruction No. 2 to see if there was any evidence adduced to justify their submission.

Specification No. 1 relates to a failure on the part of Gladys Naber to maintain and keep a proper lookout as she approached the intersection. The evidence justifies the submission of this contention for a jury would be justified in finding that she did not.

Specification No. 2 relates to her failure to keep her automobile under control. Considering the circumstances of where and how the accident happened, the speed of her car, and the question of her maintaining a proper lookout, we think a jury would be justified in finding that she did not keep her automobile under control as she approached and entered the intersection.

Specification No. 3 relates partly to specification No. 1 and partly to the speed of her car as it approached and entered the intersection, describing it. We think a jury would be justified, in view of the evidence adduced, in finding she was negligent in entering this intersection at the speed she did and in failing to slacken her speed below 30 miles an hour as she did so.

Specification No. 4 relates to the rate of speed at which she approached and entered the intersection and her inability, because thereof, to control, stop, or turn aside her car in time to avoid the accident. We think the record justifies the submission of this specification. As stated in Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499: "What is a reasonable speed is necessarily largely dependent on the situation and the surrounding circumstances, it being obvious that a speed which would be safe, reasonable, and proper in some places and under some circumstances might be highly dangerous, unreasonable, and improper in other places and under other circumstances."

And in Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112, we said: "The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined

by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing."

Plaintiff complains primarily of the giving of specification No. 5 because, as she contends, defendant admitted on cross-examination that the Buick entered the intersection first. It is true that defendant so testified but he also testified otherwise and the physical facts, as well as the circumstances disclosed by other evidence adduced, support the latter. We think, in view of this situation, it was a question for the jury to determine as to which car actually entered the intersection first and had the right-of-way and that defendant was not conclusively bound as to that issue by the one statement he made. Nama v. Shada, 150 Neb. 362, 34 N. W. 2d 650; Kipf v. Bitner, 150 Neb. 155, 33 N. W. 2d 518; Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236. We think the correct rule is stated in 169 A. L. R. under the annotation of "Binding effect of party's own unfavorable testimony" under IV b, at page 805, as follows: "* * * where the more favorable evidence relied on by a party to overcome the effect of his own self-injurious statement is in his own testimony, no distinction is drawn as compared with the situation where the curative evidence is from other witnesses. It is still for the trier of fact to decide the issue upon all the evidence." Insofar as our holding in McCleneghan v. Powell, 105 Neb. 306, 180 N. W. 576, is in conflict therewith the same is overruled.

Specification No. 6 is merely a conclusion and, in fact, states the issue of sole proximate cause as pleaded, that is, it states the accident was due entirely to negligent conduct on the part of Gladys Naber and unavoidable insofar as the defendant was concerned. We do not think it should have been given in this form as it really relates itself to no specific conduct on the part of Gladys Naber to which the jury could direct its attention insofar as her conduct being negligent is concerned. As stated in

Parker v. Womack, 37 Cal. 2d 116, 230 P. 2d 823: "'* * * if the accident was inevitable or unavoidable that is the same thing as to say that the defendant was not negligent, or that his negligence, if any, did not cause the accident. In other words, it is to say that the plaintiff has failed in his proof.' (Jolley v. Clemens, 28 Cal. App. 2d 55, 72, 73 (82 P. 2d 51) * * *.)" However, we do not think it was prejudicial in view of our holding as to specifications Nos. 1 and 5, both inclusive.

Plaintiff complains of instruction No. 17 given by the trial court. This instruction relates to the duty of one reaching an intersection and having the right-of-way. It properly states the rule in regard thereto as we have hereinbefore set out the duties under such circumstance. Under the factual situation disclosed by the evidence adduced the jury could find it had relation to either Gladys Naber or defendant and it is so worded. We do not think the fact that the masculine pronoun was used in any way limits the application thereof since the language used is general in its nature.

Plaintiff complains of the court's instruction No. 11 which relates to speed. The complaint is that the instruction does not include all of the elements of statutory provisions with reference thereto and all limitations thereon. We think the instruction covers the situation here presented for the question primarily involved is whether or not driving into the blind intersection at 30 miles an hour was negligence under all the circumstances relating thereto. We have held that: "Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile, either by those involved in an accident or those in authority investigating the accident immediately thereafter." Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701. This rule relates specifically as to what facts may be shown as they can be said to bear on the question of speed, that is, what is reasonable

and prudent under the conditions existing at the time. See §§ 39-723 and 39-7,108, R. R. S. 1943. However, the various factors need not be set out in an instruction relating to speed but are sufficiently covered by that part of the instruction referring to "all the circumstances" relating thereto. An instruction on speed should always contain all material applicable limitations and qualifications thereon as contained in statutes or ordinances as they relate to the factual situation with which a jury is confronted. However, those limitations and qualifications contained therein which have no relation to the situation at hand need not be included. See Harding v. Hoffman, *supra*. We think this instruction, under the situation disclosed by the record, adequately covered the limitations and qualifications of the statutory provisions here applicable.

Plaintiff complains of the two provisions of instruction No. 12 which deal with statutory duties of drivers at intersections. In view of our holding that the jury, under the evidence adduced, could have found that the car being driven by either defendant or Gladys Naber was the first to enter the intersection, we think there was nothing wrong with either paragraph of this instruction of which plaintiff is critical. They correctly set forth the statutes that have application here. See §§ 39-728 and 39-751, R. R. S. 1943. It is true that one paragraph of the instruction uses the pronoun "he" whereas here one of the drivers was a woman. However, they are quotes from the statutes and general in their character, and we do not believe the jury could possibly have been mislead thereby. We think, under the evidence adduced, that Gladys Naber, because of the manner in which she was driving, could have been found by the jury to have forfeited her right-of-way if the jury came to the conclusion that she was driving at an unlawful rate of speed. See § 39-7,108, R. R. S. 1943.

Plaintiff complains that on cross-examination of de-

fendant her counsel was improperly limited. This relates specially to objections sustained by the trial court when defendant was asked how far it would take him, while going 40 miles an hour on a gravel road, to bring his car to a stop. While defendant testified he had driven a car for some years, and was entirely familiar therewith, he stated he had never made such a test about which he was here asked to testify. Under this situation any answer he could have given must necessarily have been a guess. We do not think the trial court erred in its discretion by sustaining the objection in view thereof. It is true that in Blado v. Draper, 89 Neb. 787, 132 N. W. 410, we held: "It is not reversible error to permit a witness, who is well skilled in the use of automobiles and is accustomed to handling and driving them, to testify as to the distance in which such a machine may be stopped when going at different rates of speed, where on the trial of a cause that question is or may become material." But that does not necessarily mean that any witness familiar with automobiles can be forced to make a guess in regard thereto when he has not only not testified in regard thereto but has, in fact, testified he has had no experience on which to base his answer. Although a wide latitude should ordinarily be given counsel on cross-examination to bring out any facts bearing upon the cause of the accident, however, such rule must necessarily have some limitation. See, Zimmerman v. Lindblad, 154 Neb. 453, 48 N. W. 2d 415; Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381.

In view of what we have said and held herein we think the trial court erred in setting aside the jury's verdict and granting the plaintiff a new trial. We therefore set aside the judgment of the trial court doing so and remand the cause to it with directions to reinstate the verdict and enter a judgment thereon for defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

BARBARA BEZDEK, APPELLEE, V. KENNETH PATRICK, APPELLANT.

82 N. W. 2d 583

Filed April 19, 1957. No. 34113.

1. **Trial.** If a motion for a directed verdict is made at the close of the plaintiff's evidence and again at the close of all the evidence, or in the alternative to dismiss plaintiff's case, to test the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom. The same rule applies to a motion for judgment notwithstanding the verdict.
2. **Automobiles: Highways.** A driver of a motor vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection.
3. ———: ———. The violation of traffic regulations concerning stop signs, speed, the manner of operating a motor vehicle on the highway, and the like is not negligence as a matter of law of any kind or degree, but it is a fact to be considered with the other evidence in the case in deciding an issue of negligence.
4. ———: ———. Where the driver of a motor vehicle approaching a through street or highway stops and looks and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether or not his conduct in doing so makes him guilty of contributory negligence is usually one for the jury.
5. ———: ———. A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored motor vehicle to exercise ordinary care to avoid an accident.
6. ———: ———. A person traveling a favored street protected by a stop sign, of which he has knowledge, may properly assume that oncoming traffic will obey it.
7. ———: ———. A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge,

he is entitled to govern his actions in accordance with such assumption.

8. ———: ———. A motorist should have his motor vehicle under such control that upon entering an intersection he can avoid a collision with another vehicle which is operated with due care.

9. ———: ———. The right of a motorist on an arterial highway to assume that a motor vehicle on a nonfavored intersecting street will be brought to a stop before entering the intersection does not permit him to claim the right-of-way when too far from the intersection to be entitled thereto.

10. **Trial.** Instructions should be considered together in order that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside.

11. **Appeal and Error.** If an examination of all the instructions given by the trial court discloses that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon.

12. **Damages: Trial.** A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law.

13. **Damages: Appeal and Error.** The question of the amount of damage is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved.

14. **Appeal and Error.** The verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Crawford, Garvey, Comstock & Nye, for appellant.

Matthews, Kelley & Delehant and *Martin A. Cannon, Jr.,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action at law brought by Barbara Bezdek as plaintiff in the district court for Douglas County to

recover damages for personal injuries sustained by her by virtue of a collision between an automobile driven by her husband, Joe Bezdek, in which she was riding as a passenger, and a truck being driven by Kenneth Patrick, defendant. The case was tried to a jury resulting in a verdict in favor of the plaintiff in the amount of $10,000. The defendant filed a motion for new trial and a motion for judgment notwithstanding the verdict. These motions were overruled by the trial court. From the overruling of the same, the defendant appeals.

The plaintiff, in her petition, charged the defendant with negligence which she claims directly and proximately caused the accident resulting in the injuries she sustained. The negligence charged is as follows: In failing and neglecting to keep a proper lookout for other vehicular traffic and in particular for the vehicle in which the plaintiff was riding; in failing to keep his truck under proper control; in failing and neglecting to grant the right-of-way to plaintiff's driver; in driving his truck at a high, dangerous, negligent, and unlawful rate of speed under the circumstances, to wit 60 miles an hour; and in failing to apply the brakes on his truck in time to avoid a collision when he had ample opportunity to do so.

The defendant's answer alleged that the sole and proximate cause of the collision and the injuries resulting therefrom to the plaintiff, if any, was the negligence of the driver of the car in which the plaintiff was riding immediately before and at the time of the collison.

For convenience we will refer to the parties as designated in the district court, to the car the plaintiff was riding in as the Bezdek car, and on occasion to the parties by their given names.

The record discloses that L Street is a through street and State Highway No. 275 at the place where the collision occurred. As L Street extends west from the boundary of Sixtieth Street at the intersection it is a two-lane highway 20 feet wide, and proceeding east

from the west boundary of Sixtieth Street it is a four-lane highway 42 feet wide. As L Street extends east from the intersection it has a grade of approximately 6.6 percent. West of the intersection it has a gradual decline ranging from a grade of 5.6 to 4.7 percent, and then flattens out as it proceeds west. In approaching this intersection from the west there is a sign stating: "Reduced Speed Zone Congested Area," up to which point the usual speed rates prevail, that is, 60 miles an hour in daylight, which would be in effect at the time this accident happened. Continuing east toward the intersection there is a sign indicating the speed limit to be 45 miles an hour.

Sixtieth Street is a two-lane street north and south of the intersection 18 feet wide, with a slight slope in both directions. There is a stop sign facing southbound traffic on the west side of Sixtieth Street 44 feet north of the edge of the paving on L Street. On the northwest corner of the intersection is a filling station referred to in the evidence as Tex's Service Station, which is of concrete block construction.

Joe Bezdek testified that he owned a two-door Studebaker automobile. On Sunday, August 1, 1954, which was a nice day, he and his wife Barbara drove to the Bohemian National Cemetery. Barbara was sitting to his right in the front seat of the automobile being driven by this witness. After leaving the cemetery they arrived at Sixtieth Street and proceeded south. He stopped the car about 2 feet to the north of the stop sign. The service station to his right obstructed his view to the west. He put his car in low gear and proceeded about 10 feet to the south of the stop sign. Looking to the west, he saw a truck about 300 feet away proceeding east on L Street. He started to step on the gas and thought he had plenty of time to cross the intersection as he was going to proceed straight south on Sixtieth Street. His car did not pick up speed. He continued to watch the truck and it continued on east without slowing

down or stopping but maintaining a rate of speed which he estimated to be 60 miles an hour. His car was in the intersection when the truck struck it on the right side with its left bumper, behind the right front wheel. The collision occurred in the intersection. He testified that he did not know what happened after the impact. He fell out of the car, slid on the cement on his hands and face, and became unconscious. He was lying in the street on his face, he thought, about 20 feet from where the accident occurred. He regained consciousness in a short time and saw his wife sitting up on the pavement about 20 feet from him. Later he saw a patrolman and some ladies from the service station who helped him and his wife. They were taken to the County Hospital. He further testified that as the truck came toward him, he stepped on the brake. He kept looking at the truck, and thought the driver of the truck would reduce its speed or stop, but he did not. The witness was proceeding across the intersection at a speed of from 7 to 10 miles an hour. He had been over Sixtieth Street once that day and apparently only once on a prior occasion. He thought there was a stop sign on L Street and that the truck would have to stop. The front of his car was beyond the north curbline of L Street. He at no time saw any car ahead of him. He watched the truck right up to the time of the collision. The accident occurred at approximately 5 p.m.

Joe Bezdek, Jr., testified that a day or so after the accident occurred he went to the scene, and that there was a square white sign 250 feet from the edge of the intersection along L Street stating the speed limit of 60 miles an hour by day and 50 miles an hour by night. A distance of 250 feet from this sign there was a bridge.

Barbara Bezdek testified that at the time of the accident she was 59 years old. As they drove up to the intersection of Sixtieth and L Streets, there was a stop sign, and her husband stopped the car. The service station to her right blocked her view to the west. She

looked both to the east and to the west, then Joe started the car, and when it was a few feet south of the stop sign she looked to the west and saw a big truck. She could not tell how far it was away from them, but it was between the big white sign and the bridge. She did not know what happened when the truck collided with their car.

The defendant, Kenneth Patrick, testified that he owned a 1952 model Ford truck. It was about 8 feet wide and 25 feet in length, equipped with what he called a "grain box." The weight of the truck was about 11,000 pounds. At the time of the collision he had 14 head of cattle in the truck. They weighed approximately 10,000 pounds. The truck was equipped with four speeds forward. He operated his own truck, and had for 15 years, primarily to haul livestock to the market in South Omaha. He lived at Genoa, and averaged about three trips a week to Omaha. On Sunday, August 1, 1954, he was hauling cattle to Omaha. He left Genoa at approximately 1 p.m., and got onto State Highway No. 275 at Fremont, the route he always took to South Omaha. He drove at a speed not in excess of 45 miles an hour. He further testified that Joe Pencak, the owner of the cattle he was transporting to market, was riding with him. He was familiar with the intersection of Sixtieth and L Streets, and there was no stop sign as you approach Sixtieth Street from the west on L Street. When he was proceeding east on L Street and approximately 75 to 100 feet from the intersection, a car came from the north and turned east on L Street. He was driving his truck on the right, or south traffic lane and had entered the intersection with the front wheels of his truck about even with the center line of the intersection when the impact took place. The instant he saw the Bezdek car, he attempted to bring the truck to a stop and endeavored to avoid an accident. He applied the brakes, swerved the truck to the right, or south, and about that time the Bezdek car and his truck collided.

The left front fender of the truck was alongside the right front wheel of the Bezdek car. It appeared to the defendant that Bezdek was attempting to make a turn to the left or east. He applied the brakes about the time the Bezdek car and his truck collided. The impact and the setting of the brakes threw the cattle against the front of the truck box with the result that glass broke and flew into the cab, and about all he could do at that time was straighten the truck up, release the brakes, and let the truck come to a stop. He testified that he went about 200 feet before the truck came to a stop. The Bezdek car glanced off to the north side of the highway. He stayed with the truck, and was able to drive it home. He maintained a rate of speed of 40 miles an hour at the time he entered the intersection, and generally drove at a speed of 45 miles an hour.

On cross-examination he testified that the hill on L Street starts going up before arriving at Sixtieth Street, and is a steep hill; that a driver going south on Sixtieth Street would have his view to the west impaired by the service station; and that he knew that traffic could be coming out from behind the service station. He noticed the sign "Congested Area, Reduce Speed." When he reached the sign, he was proceeding at 40 miles an hour. He did not slow down as he passed the sign, nor until the time of the impact. He was just in the intersection when he saw the Bezdek car, but did not say how far into the intersection. He saw the Bezdek car just an instant before the impact, and at that time the Bezdek car and his truck were practically together. He believed there were no trees or shrubs outside the service station. He did not know exactly where the Bezdek car and his truck came together.

A Nebraska safety patrolman arrived at the scene of the accident just prior to 5:20 p.m. He testified that it was cloudy, the ground was dry, and there was daylight visibility. He observed cars at the scene of the accident, one the Bezdek car and the other the defendant's truck.

The marshal of the village of Ralston and this patrolman took some measurements. The right side of the Bezdek car was 53 feet east and 11 feet 5 inches north of the center of the intersection. The rear end of the Bezdek car pointed west. With reference to the defendant's truck, it was 207 feet east of the center of the intersection, and the right side of the truck was 11 feet 7 inches north of the south edge of L Street. In the intersection he found debris and dirt 7 feet 5 inches south and 3 feet 3 inches west of the center of the intersection. When he arrived at the scene of the accident, Mr. and Mrs. Bezdek were lying on the ground in the vicinity of the intersection.

On cross-examination he testified that west of Sixtieth Street on L Street there was a 45-mile-an-hour speed sign; and that the speed would be 60 miles an hour by day and 50 miles an hour by night west of that area. The stop sign facing L Street north on Sixtieth Street is for southbound traffic and is in front of the Tex's Service Station. As a practical matter, one approaching that stop sign and stopping even with it and looking to the west would be looking into the service station. A person would have to go beyond the service station before he could have a clear view to the west.

The defendant contends that the trial court committed reversible error in the following respects: (1) The trial court erred in including in its instruction No. 10 to the jury the following words: "but, having complied with the rule to stop at a point where he can reasonably see," for the reason that there is no evidence in the record to support such statement; (2) the trial court erred in including in allegation No. 3 of its instruction No. 1 to the jury the following words: "In failing to grant the right-of-way to the plaintiff," for the reason that there is no evidence in the record to support the implication that the plaintiff had the right-of-way; (3) the trial court erred in failing to sustain the defendant's motion for a directed verdict at the end of the plaintiff's

evidence, or at the end of all of the evidence; and (4) the trial court erred in failing to sustain the defendant's motion for new trial or, in the alternative, defendant's motion for judgment notwithstanding the verdict.

Before determining the assignments of error we call attention to the following rule which is applicable: "If a motion for a directed verdict is made at the close of the plaintiff's evidence and again at the close of all the evidence, or in the alternative to dismiss plaintiff's case, to test the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751. The same rule applies to a motion for judgment notwithstanding the verdict. Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367.

With reference to defendant's assignment of error No. 1, the defendant argues that Joe Bezdek, the driver of the car in which the plaintiff was riding, stopped 2 feet north of the stop sign on Sixtieth Street; that there was a filling station at the northwest corner of the intersection of Sixtieth and L Streets; that this stop sign was 10 feet north of the south line of the filling station and at that point where Joe Bezdek stopped his car he would be unable to see traffic on L Street approaching the intersection from the west; and that in emerging south from the stop sign Joe Bezdek, in driving his car, disregarded the traffic on the highway and under the circumstances the trial court's instruction was too broad and constituted reversible error.

Instruction No. 10 given by the trial court is as follows: "The statute requires one to come to a full stop as near the right-of-way line as possible before driving onto the state highway and to give the right-of-way to vehicles on such highway, regardless of direction, but does not require a driver to remain in that position until

the highway is entirely clear of traffic, but, having complied with the rule to stop at a point where he can reasonably see, if it appears to him in the exercise of ordinary care that any traffic is so far away and proceeding at such as (sic) speed that he could safely cross, he would not be negligent if he so proceeds and exercised ordinary care in doing so."

"A driver of a vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection." Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643. See, also, Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501; Paddack v. Patrick, 163 Neb. 355, 79 N. W. 2d 701.

"The violation of traffic regulations concerning stop signs, speed, the manner of operating a motor vehicle on the highway, and the like is not negligence as a matter of law of any kind or degree, but it is a fact to be considered with the other evidence in the case in deciding an issue of negligence." Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593.

The record shows that Joe Bezdek, after arriving at the stop sign, put his car into low gear and proceeded at a speed of 7 to 10 miles an hour, and when about 10 or 11 feet south of the stop sign he looked to the west and saw the defendant's truck at a distance of 300 feet proceeding east toward the intersection. At that time the Bezdek car was approximately 34 feet from the north edge of the intersection, the stop sign being approximately 44 feet from the north edge of the intersection. He thought that he had plenty of time to cross the intersection to proceed directly south on Sixtieth Street. He stepped on the accelerator, but the car did not pick up speed. He continued to watch the defendant's truck which did not slow down or stop, but maintained the same speed as at the time he first saw it. The defend-

ant's truck struck the right side of the Bezdek car and the right front wheel. The defendant testified that he did not observe the Bezdek car until just an instant before the collision occurred.

As said in Borcherding v. Eklund, *supra*: "Where the driver of a car approaching a through street or highway stops and looks and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether or not his conduct in doing so makes him guilty of contributory negligence is usually one for the jury." See, also, Paddack v. Patrick, *supra*.

We find no merit to the first assignment of error.

With reference to the defendant's second assignment of error, the defendant states that it was stipulated that the defendant was traveling on State Highway No. 275. Defendant argues that a stop sign faced traffic for a driver proceeding south on Sixtieth Street before entering the intersection; and that negligence of the plaintiff's driver was the direct and proximate cause of the collision and, this being true, no recovery could be had in favor of the plaintiff. In addition, the defendant argues that Joe Bezdek thought, or believed, there was a stop sign on L Street which would require the defendant driver to stop his truck before entering the intersection. Therefore, in connection with the argument as previously set out, there could be no recovery in behalf of the plaintiff.

We believe the following to be applicable: "A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored car to exercise ordinary care to avoid an accident." Evans v. Messick, 158 Neb. 485, 63 N. W. 2d 491.

"A person traveling a favored street protected by a

stop sign, of which he has knowledge, may properly assume that oncoming traffic will obey it.

"A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accordance with such assumption." Angstadt v. Coleman, 156 Neb. 850, 58 N. W. 2d 507. See, also, Paddack v. Patrick, *supra*.

"An automobile driver should have his car under such control that upon entering an intersection he can avoid a collision with another car which is operated with due care." Woracek v. Schuehart, 130 Neb. 260, 264 N. W. 670.

"The right of a motorist on an arterial highway to assume that a motor-cycle (here, a car) on a non-favored intersecting street will be brought to a stop before entering the intersection does not permit him to * * * claim the right of way when too far from the intersection to be entitled thereto." McCulley v. Anderson, 119 Neb. 105, 227 N. W. 321.

We believe, as shown by the evidence and the foregoing authorities, that the negligence of the driver of the car in which the plaintiff was riding and the negligence of the defendant were questions for the jury to determine.

As to the instructions complained of, the following is applicable.

Instructions should be considered together in order that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside. If an examination of all the instructions given by the trial court discloses that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon. See, Blanchard v. Lawson, 148 Neb. 299, 27 N. W. 2d 217; Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293;

Griess v. Borchers, 161 Neb. 217, 72 N. W. 2d 820.

The defendant's second assignment of error cannot be sustained.

The defendant contends that the verdict is excessive and that the only element of damage was pain and suffering.

The record discloses that after the accident occurred both the plaintiff and her husband were taken to the County Hospital in an ambulance, where they were placed in separate rooms. After a few hours they were removed to their home and the plaintiff went to bed. She testified that she was confined to bed for 12 or 13 weeks; that during that time she suffered great pain and anguish; that her right leg was badly swollen as well as her right ankle; and that she was unable to do any of her housework.

A niece of the plaintiff testified that she and her husband went to the hospital and took the plaintiff home on August 1, 1954; that she stayed with her, alternating with the plaintiff's son and his wife, both day and night for a period of approximately 5 or 6 weeks; and that they applied hot and cold packs to the plaintiff's injuries. During all of that time the plaintiff was confined to her bed. After that time, neighbors took over and cared for the plaintiff. The plaintiff's right leg was swollen, and at times the swelling would increase. During the time this witness was there, the plaintiff was unable to get out of bed for any purpose.

It also appears from the record that Dr. Christlieb attended the plaintiff immediately after the accident for a short period of time, since her regular physician was on vacation. Upon his return, Dr. Srb saw the plaintiff at her home. He testified that he treated the plaintiff for the injuries she received in the accident of August 1, 1954; and that she had a contusion of her whole right leg which was black and blue in places. He found no fracture, nor was there any fracture at any time. She was put to bed and ordered to stay there. She

remained in bed for several weeks. He described her condition as being a serious ecchymosis, with bruises and blood clots up and down her right leg, above her ankle. On August 27, 1954, he opened a hematoma, which is a blood tumor where the blood, having escaped from veins or arteries, coagulates in the tissues causing pain. To relieve the pain, he performed this operation. On September 21, 1954, he incised another hematoma to give her relief from pain. He continued to see her and treat her until the time of trial. She had an edema of her ankle, which is a swelling, disclosing interference with the circulation. He examined her shortly before the trial and testified that if she remained in bed the swelling would lessen or go down. In a normal case of this type, the swelling would go down in a year or less, but in this particular case the swelling was still present and it had been more than a year since the accident. He did not feel that the swelling would leave or that there would be any change in her condition from that time on. On cross-examination he testified to the various times he saw and treated the plaintiff; that she was not carried into his office, but walked; and that at the time of trial she had a swelling of her right ankle.

A doctor who made an examination of the plaintiff just prior to the trial testified that in the plaintiff's right leg there was a disturbance in the return circulation, or in the circulation proper, which enlarged and dilated the veins and created a swelling around her ankle; that the fluid elements of the blood get into the tissues by increased pressure in the smaller blood vessels; that such damage often results from trauma such as a blow; and that the injury the plaintiff had at that time was permanent. In his opinion, considering the time that had elapsed after the accident and the disability still present, the injury would remain as it was, and constitute a permanent injury.

The defendant's doctor, who examined the plaintiff thoroughly, testified that she was normal in all respects

except that her right leg exhibited a grade 2 edema. Grade 1 would be the lowest, and grade 4 the most serious. She walked with a peculiar gait. The doctor concluded that from the history it would be right to presume that the injury to the right lower extremity produced an acute thrombophlebitis. As a result, she had a chronic edema of the right lower extremity resulting from a venous or lymphatic obstruction, or both.

"A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law." Remmenga v. Selk, 152 Neb. 625, 42 N. W. 2d 186.

" 'The question of the amount of damage is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved.' " Bresley v. O'Connor Inc., 163 Neb. 565, 80 N. W. 2d 711. See, also, Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N. W. 2d 643; Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N. W. 2d 627.

"The verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong." Griess v. Borchers, *supra*. See also, Granger v. Byrne, *supra*.

We find that the verdict and judgment were sustained by competent evidence and that there was no error in the record prejudicial to the rights of the defendant, therefore, the judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

ELLA L. ROBINSON, APPELLEE, V. GEORGE L. ROBINSON, APPELLANT.
82 N. W. 2d 550

Filed April 19, 1957. No. 34124.

1. Divorce. A decree of separate maintenance may be granted only when the evidence brings the case within the scope of the statute providing for such relief.
2. ———. A decree of separate maintenance may not be granted on the uncorroborated declarations or admissions of the parties to the case.

APPEAL from the district court for Douglas County: HERBERT RHOADES, JUDGE. *Reversed and remanded with directions.*

George B. Boland and *A. J. Walen,* for appellant.

Burbridge & Burbridge, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

The plaintiff, Ella L. Robinson, filed this suit for an absolute divorce against the defendant, George L. Robinson, on the ground of extreme cruelty. The defendant denied plaintiff's charge of misconduct and prayed for a dismissal of her petition. The trial court denied the plaintiff an absolute divorce and granted her a decree of separate maintenance. The defendant has appealed.

The parties were married on October 6, 1932. Plaintiff is 56 years of age and had two sons by a previous marriage. Defendant is 60 years of age and had three children by a previous marriage. No children were born to the parties to this suit. The children of the plaintiff lived in the home most of the time until they became self-supporting. The children of the defendant lived with their mother and were never in the home of these parties. The evidence is clear that the children of the parties were never a cause of dissension and were not a contributing factor to the divorce proceeding. The

record shows that the parents of the plaintiff lived with the parties during the winter for 12 years or more and since 1953 have lived with them permanently. The evidence is undisputed that defendant had a very high regard for plaintiff's parents and approved of their living in the home. The care and support of plaintiff's parents in the home in no manner contributed to the marital difficulties of the parties.

At the time of the marriage defendant had approximately $8,500 and two automobiles. After spending the first years after the marriage as a traveling salesman, defendant embarked in the construction business. In 1941 he went through bankruptcy when he owed about $4,000. Subsequent to receiving his discharge in bankruptcy he paid off this indebtedness. Commencing in 1947 defendant began to accumulate considerable property. He engaged in the manufacture of metal corner bead for dry wall construction and metal trim for doors and windows. The business became very profitable. He had also become engaged in the construction and sale of residence properties. While there is great conflict in the evidence as to his net worth at the time the divorce was commenced, the record indicates that it was at least $200,000. In view of the result at which we arrive, we shall not determine the extent of his holdings with any degree of certainty.

As grounds for a divorce the plaintiff alleges that on August 25, 1955, defendant threatened her life, that he became moody and used vile and profane language toward the plaintiff and guests visiting in the home, and that he would absent himself from the home without explanation. She asserts that this caused her to become nervous and in ill health, and that his acts have completely destroyed the objects of matrimony. The defendant denies any misconduct on his part. The record does show that plaintiff lost weight and became nervous. The evidence fails completely to corroborate her statements as to any misconduct on the part of the defendant

and the trial court was in all respects correct in denying her an absolute divorce.

The defendant asserts that the evidence is insufficient to support a decree for separate maintenance, attorney's fees, and costs. The determination of this issue requires a further consideration of the evidence.

The plaintiff contends that defendant once threatened her life. The defendant denies it. The circumstances were as follows: Plaintiff says that defendant was driving her to a garage to get her automobile which was there for repairs. She says he started to condemn her daughter-in-law and she told him to talk about his daughter-in-law and not hers. She states that he swore and said: "Some of these days I am going to kill you." The defendant says that he complained to the plaintiff about her daughter-in-law turning her three little boys against him and "that is going to kill me." Plaintiff asked why he did not bring up his own daughter-in-law. At that time they arrived at the garage and defendant said: "You had better get out right now." There is no corroboration of this incident in the record.

Plaintiff complains about the defendant going to California in January 1956 and refusing to take her with him. He says he offered to take her if she would get a suitable person to care for her parents. She wanted her brother to come into the home for this purpose. Defendant refused to permit this, but was agreeable to employing a practical nurse. Plaintiff refused to do this, and defendant stated she would have to remain and do it herself. The evidence shows that defendant left more than $1,000 in the bank subject to her check when he left. She drew out this money and used some of it for a plane trip to Arizona to visit her son. Upon her return she filed this suit for a divorce.

The plaintiff complains that defendant took $50,500 with him on his trip to California without informing her. The defendant states that he expected to set up another manufacturing plant or establish two ware-

houses on the west coast to further his business interests. He testifies that although he had an established credit, a substantial bank account permitted him to operate more expeditiously. Upon his return he immediately told the plaintiff where the money was deposited and offered to show her his bank book. It is true that he did not tell her his intentions before he left. Plaintiff appears to have the notion that the removal of this money out of the jurisdiction was a violation of his marital obligations. There is no merit to this contention. She complains also that defendant did not communicate with her during this 5-week trip. The evidence shows the defendant did communicate with his office in Omaha and requested plaintiff's son to advise his mother where he was. The evidence shows that plaintiff made no effort to communicate with defendant, even though she knew where he was. This seems to fit the pattern that they had previously followed over the years. We find nothing in this evidence that sustains plaintiff's allegations of extreme cruelty.

The evidence shows for the first 23 years of their married life these parties got along exceptionally well. Plaintiff worked as a beauty shop operator when times were hard. Defendant praises her as a housekeeper and cook. Plaintiff kept house without help and appears to have been frugal in her handling of money. The defendant built a new home costing in excess of $50,000, which they occupied in 1954. He furnished it with the best of furniture and household equipment. He bought plaintiff a new automobile costing in excess of $3,500 within a year previous to the commencement of their marital troubles. He bought her presents on her birthdays and at Christmas time. He treated her children the same as his own. He helped her children with gifts and loans, the same as his own. He carried most of his real estate in joint tenancy with the plaintiff, at her insistence. She always had an adequate checking account. The defendant contends that plaintiff lost her

affection for him and became cool toward his advances and efforts at a reconciliation of their marital troubles. The plaintiff contends that it was the defendant who brought about their apparent differences. There is no evidence corroborating the statements of either. It is evident, however, that it is the plaintiff and not the defendant who wants a divorce and a division of the property. The most favorable view of the evidence reveals little, if any, corroboration of the misconduct attributed to the defendant. The decree for separate maintenance is not supported by the evidence.

It is clear from the evidence in this record that these parties lived together for 23 years or more as a happy and contented married couple. The most that either testify to is that a coolness developed between them. The evidence of neighbors and friends, considered in its most favorable light, is that they did not appear to talk to each other as much as formerly and that a tension appeared to exist; some of whom testify that they realize it only in retrospect. A dissolution of a marriage by divorce or separate maintenance cannot be sustained on such flimsy grounds. A marriage contract is one having a great public interest and it cannot be dissolved except when all conditions of controlling statutes are met. The parties to a marriage assume duties and obligations of a most solemn character. They may not be put aside at the will of the parties as in an ordinary partnership. A divorce or legal separation must be grounded on a legal fault within the grounds enumerated in the statutes and proved in the manner therein provided. One party may not create the grounds that will sustain him or her in maintaining such a suit. It is not the province of the courts to grant such decrees for sociological reasons. The policy of the state relative to marriage is fixed by the Legislature. It is not for this court to do what it deems best for the parties, The only relief that may be granted is that provided

by statute when the evidence is sufficient to bring the case within its purview.

The evidence in this record does not show a semblance of a cause of action for divorce or separate maintenance. It would be manifestly unjust to require the husband in such a situation to divide his property, jeopardize his business, and destroy his source of income on such trivial grounds. One party to a marriage is not required to suffer detriment because the other, through whimsy, fancied wrongs, or petty grievances, elects to violate the marital obligation. The evidence shows the marriage to have been a happy one during the periods that the parties were suffering economic reverses. When defendant's business became successful and the parties began to accumulate property and money in substantial amounts, the demands of the wife became progressively greater. The defendant appears to have complied with her wishes in taking real estate in joint tenancy and in maintaining joint bank accounts to the extent possible. Now she wants half of the property and a termination of the marriage relation, when legal fault on the part of the husband was not shown. So long as the defendant fulfills his marital obligations, she is not entitled to any such relief. The following cases support this conclusion: Brown v. Brown, 130 Neb. 487, 265 N. W. 556; Peterson v. Peterson, 153 Neb. 727, 46 N. W. 2d 126; Schwarting v. Schwarting, 158 Neb. 99, 62 N. W. 2d 315; Smith v. Smith, 160 Neb. 120, 69 N. W. 2d 321.

For the reasons stated, the judgment of the district court awarding separate maintenance, attorney's fees, and costs, is reversed and the cause remanded with directions to dismiss the case and tax the costs to the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

R. B. LEACH, APPELLANT, V. CLARENCE L. TREBER ET AL., APPELLEES.

82 N. W. 2d 544

Filed April 19, 1957. No. 34140.

1. **Trial.** If, from undisputed evidence, different minds may not reasonably reach different conclusions or draw different inferences, the trial court should render judgment consistent with the facts.
2. **Bills and Notes.** Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon, to have become a party thereto for value.
3. **Bills and Notes: Pleading.** In an action on a promissory note, the party alleging want of consideration has the burden of proving it by a preponderance of the evidence.
4. **Bills and Notes.** A promissory note is supported by a valid consideration if the transaction confers a benefit upon the promisor or causes a detriment to the promisee, and either is a valid consideration which will support a contract.
5. **Bills and Notes: Contracts.** In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them.
6. **Contracts.** Mutuality of obligation of both parties to a contract is not essential to effectuate a binding agreement where there is a separate valid consideration as an inducement to the agreement.
7. ———. A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.
8. **Witnesses.** As a general rule, a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded.*

Richards, Yost & Schafersman, for appellant.

Richard A. Dier, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiff, R. B. Leach, brought this action against defendants, Clarence L. Treber and Donna Treber, seeking recovery upon a certain unpaid promissory note allegedly executed and delivered to him for valuable consideration by defendants as C. L. Treber and Mrs. C. L. Treber. The instrument, dated June 9, 1955, and due 180 days after date, on December 9, 1955, was for the principal sum of $2,500 with interest at six percent until due, and nine percent from maturity until paid. Hereinafter, Clarence L. Treber will be called defendant and Donna Treber will be designated as Mrs. C. L. Treber. When speaking of them both, they will be called defendants.

Defendants' answers admitted execution and delivery of the note on or about the date thereof, but alleged that it was without any legal consideration which could give it validity and make it collectible, therefore nothing was due thereon. Plaintiff's reply was a general denial.

Jury trial was waived, and after trial to the court it rendered judgment which found for defendants and against plaintiff, and dismissed plaintiff's petition at plaintiff's cost. Thereafter, plaintiff's motion for new trial was overruled, and he appealed, assigning, insofar as important here, that the judgment was contrary to the evidence and law. We sustain the assignment. Concededly, the sole question presented is whether or not there was a legal consideration for the note. We conclude that there was.

It is now elementary that findings of a court in a law action in which a jury is waived have the effect of the verdict of a jury and judgment thereon will not be disturbed unless clearly wrong. Also, in testing the sufficiency of the evidence to support a verdict and judgment, it must be considered in the light most favorable

to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can be reasonably deduced therefrom. On the other hand, as held in Trask v. Klein, 150 Neb. 316, 34 N. W. 2d 396: "As a general rule a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable.

"A party who offers the evidence of a witness cannot subsequently object that it should not have been received or that it is insufficient to sustain a judgment based thereon.

"But where such evidence is contradicted, either expressly or by inference, by evidence which would justify the trier of facts in arriving at a different conclusion, the party offering it is not ordinarily concluded thereby."

Also, as concluded in Farmers & Merchants State Bank v. Kuhn, 125 Neb. 457, 250 N. W. 652, if from the undisputed facts different minds may not honestly reach different conclusions or draw different inferences without reasoning irrationally, the trial court should render judgment consistent with the facts. Further, as stated in that opinion: "* * * to constitute a consideration for the giving of a promissory note it is ordinarily unnecessary that any benefit result to the promisor, it being sufficient if the transaction results in trouble, injury, inconvenience, prejudice or detriment to the promisee; * * *." We also held therein that: "Good consideration for a promissory note may consist of money received by the maker or of money or property lent, advanced or returned by said payee to a third person at the instance of said maker and with her knowledge and consent." See, also, Vybiral v. Maly, 123 Neb. 436, 243 N. W. 268.

In Plaza Hotel Co. v. Hotel Stratton, 132 Neb. 396, 272 N. W. 224, we held: "In an action on a promissory note, the burden is on the defendant to establish the defense of want of consideration.

"It is not essential to a valid consideration that it should move to the promisor. It is sufficient if it causes a loss, disadvantage, or imposes a legal obligation upon the promisee." See, also, Johnson v. Hansen, 139 Neb. 428, 297 N. W. 643.

As stated in Plumbly v. Harvard State Bank, 133 Neb. 630, 276 N. W. 385: "The burden of proving want of consideration was upon plaintiff, the party alleging it. Farmers & Merchants State Bank v. Kuhn, 125 Neb. 457, 250 N. W. 652; Neslund v. Kinnan, 129 Neb. 279, 261 N. W. 358. 'Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.' Comp. St. 1929, sec. 62-201. 'Value is any consideration sufficient to support a simple contract.' Comp. St. 1929, sec. 62-202. See, also, Cozad State Bank v. McLaughlin, 128 Neb. 87, 258 N. W. 36. 'There are two kinds of consideration,—that which confers a benefit upon the promisor and that which causes a detriment to the promisee. Either is a valid consideration which will support a contract.' United States Fidelity & Guaranty Co. v. Curry, 126 Neb. 705, 254 N. W. 430." See, also, In re Estate of Tynan, 142 Neb. 671, 7 N. W. 2d 628; Petersen v. Dethlefs, 139 Neb. 572, 298 N. W. 155.

As held in Elson & Co. v. Beselin & Son, 116 Neb. 729, 218 N. W. 753, and reaffirmed in Stanford Motor Co. v. Westman, 151 Neb. 850, 39 N. W. 2d 841: "Mutuality of obligation of both parties to a contract is not essential to effectuate a binding agreement where there is a separate valid consideration as an inducement to the agreement; * * *."

In Scottsbluff Nat. Bank v. Blue J Feeds, Inc., 156 Neb. 65, 54 N. W. 2d 392, we held that: "A negotiable instrument as between the parties requires a consideration the same as any other contract, and when there is no consideration, * * * such absence of consideration is a defense to such instruments.

"In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them."

As said in Restatement, Contracts, § 90, p. 110: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

Fender v. McCain, 144 Neb. 58, 12 N. W. 2d 541, and other authorities relied upon by defendants are entirely distinguishable upon the facts hereinafter recited and law applicable thereto.

In the light of the afore-cited rules, we have examined the record. In that connection defendants assumed the burden of establishing that there was no legal consideration for the note. In doing so, they called plaintiff as their own witness, thus vouched for his credibility and were bound by his material and relevant testimony because it was not contradicted or shown to be unreliable either expressly or by inference except by the mere conclusion of defendant who voluntarily, without any excessiveness, fraud, or imposition being shown by competent evidence executed and delivered the note, but now simply says that: "I received nothing for the note. * * * Well, I had no reason for signing the note. It was a stupid mistake."

The record discloses that the note was concededly executed on June 9, 1955, by defendant in a little cafe in Kearney. Plaintiff furnished the printed form thereof and concededly defendant in his own handwriting appropriately completed every blank space thereon and signed same. As agreed, he then took the note home in order to obtain Mrs. C. L. Treber's signature. There she signed it at her husband's request without asking or knowing what it was for but assuming that it was in connection with defendant's business. The next day,

in compliance with an agreement hereinafter set forth, defendant delivered the note to plaintiff, the payee therein. It was received in evidence without objection.

Evidence adduced by defendant discloses that plaintiff had a corporation known as "Convair Coach Corporation" which had been producing and selling house trailers in Fremont. Defendant, a graduate of the University of Wyoming as an architectural engineer, was employed in February 1953, when he was 26 year old, as production manager and later as purchasing agent for the corporation. His salary until May was $85 a week plus a production bonus of $10 a trailer. Thereafter it was $100 a week plus such a production bonus. That corporation had originally issued $7,000 of stock at par value of $100, but as plaintiff advanced more money to the corporation, $15,000 of stock therein was eventually issued, all of which was owned by plaintiff until in May 1954. That corporation appears to have been in good financial condition during 1953 and 1954, with its stock worth considerably more than $100 a share. On May 11, 1954, defendant purchased five shares of such stock from plaintiff for $2,000, and on December 23, 1954, plaintiff, in appreciation of defendant's efficient services, gave him two more shares. Thus plaintiff and defendants were sole stockholders, and each drew salaries therefrom.

During that period plaintiff conceived the invention of a hot water heater system for trailers. Subsequently, a corporation called the Weatherall System, Inc., was organized for the production and marketing of that product, and both plaintiff and defendant while employed by their Convair Coach Corporation devoted several months of their time to its development. A patent for the invention was ultimately granted. However, while this was being done by plaintiff and defendant, their Convair Coach Corporation became financially involved and ultimately insolvent, with a $12,000 first mortgage on its equipment, and about $24,000 of un-

secured open accounts owing and unpaid by it. In that situation, plaintiff and defendant started west, planning thereby at some point to arrange for production and marketing of their hot water heater belonging to Weatherall System, Inc. In doing so they stopped at Kearney and there, through the Chamber of Commerce, interested two financially responsible men in that project. However, such project did not develop, but at Kearney they did start a new corporation called Convair Mobile Homes, Inc., with which to produce and market trailers. Thus, through plaintiff's efforts defendant was given the position of director, production manager, and engineer for that corporation at a salary of $125 a week together with an interest of 75 shares of stock in such corporation if defendant voluntarily stayed with the corporation as such employee for 3 years. The agreement with regard thereto, executed by plaintiff, defendant, and the two Kearney men aforesaid on May 10, 1955, appears in the record. That agreement provided that plaintiff was to pay to the corporation $10,000 within 120 days after articles of incorporation were perfected, and devote his time and efforts to establish a production line, arrange for supplies, and set up a sales organization for the corporation, for which he was to receive 150 shares of stock in that corporation. Plaintiff devoted his services to that corporation for about 3 months but was unable to make the $10,000 payment when due, so the other two men, who under the agreement of May 10, 1955, were to each provide $7,500 cash and receive 75 shares of stock in that corporation, bought plaintiff out, and defendant was made president of that corporation.

In the meantime, plaintiff and defendant had talked about how much stock defendant should receive in the Weatherall System, Inc., as compensation for the extra engineering work he had performed in perfecting the invention, but no amount therefor had been definitely agreed upon. However, on July 19, 1955, following the

execution of defendants' note on June 9, 1955, defendant was issued 100 shares of original stock in Weatherall System, Inc. Certificate therefor was signed by plaintiff as president and defendant as secretary of that corporation.

After discovering that their Convair Coach Corporation had become insolvent as aforesaid, with suits threatened against the corporation, and that it was pretty hopeless to recover, pay its debts, and keep the corporation operating successfully, plaintiff and defendant discussed that situation on several occasions. Each of them agreed at all times that as persons of character that corporation's unsecured debts, created by them as its sole stockholders, should be paid by them as a moral obligation in order to successfully raise some money and promote their business interests in Kearney. In January 1955 they sent out a letter to all creditors indicating their intention, without binding themselves personally, to see that the corporation eventually would pay its obligations. They thereafter decided that after the first mortgage was satisfied, they would sell those assets remaining and pay unsecured creditors the proceeds therefrom as far as they would reach. That was done but there wasn't much left to pay such creditors. Confronted with that situation, and desiring to successfully get back into business with Convair Mobile Homes, Inc., in Kearney and make some money, plaintiff and defendant met in Kearney on June 9, 1955, where plaintiff was then employed by Convair Mobile Homes, Inc., at $100 a week and defendant was employed by that corporation at $125 a week. After having been together there during the day discussing the problem, they met in a little cafe in the evening. There one or the other or both of them figured out the percentages or shares of the amount of unsecured obligations owing by the Convair Coach Corporation which each should assume to pay in some appropriate manner. Thus they arrived at a figure of $4,000 as the share

thereof which defendants should assume by giving plaintiff a note for that amount. However, to do that defendant wanted plaintiff to guarantee that all unsecured creditors of that corporation would be paid in full by plaintiff. Plaintiff did not feel that he could go that far but agreed to personally pay a $3,000 note owing the bank in Fremont and certain other unsecured obligations amounting to some $14,000 if defendants would give him their note due in 180 days for $2,500, which would clear and release defendants from all responsibility for the unsecured obligations of their failed corporation and place that responsibility entirely upon plaintiff. That arrangement was then agreed upon by plaintiff and defendant, and pursuant thereto defendants executed and delivered their note for $2,500 to plaintiff who thereafter in reliance thereon and without dispute concededly performed his part of their agreement and paid $17,362.28 of their Convair Coach Corporation's unsecured obligations.

In the meantime, on August 5, 1955, at a stockholders' meeting whereat plaintiff and defendant, as sole stockholders, were present, it was moved, seconded, and unanimously carried, that the Convair Coach Corporation should be dissolved pursuant to law, and plaintiff should be appointed to act as liquidating agent should any future action be required. Whether or not such corporation was actually dissolved in compliance with law is not clearly shown. Thereafter, however, when defendants' note was due on December 9, 1955, and plaintiff sought payment thereof from defendant, he was informed for the first time that it would not be paid.

In the light of the authorities heretofore set forth and the undisputed evidence heretofore recited, we conclude that there was a valid legal consideration for the note and that the judgment of the trial court was clearly wrong. It should be and hereby is reversed and the cause is remanded. All costs are taxed to defendants.

REVERSED AND REMANDED.

IRENE AKINS, APPELLANT, V. FLORENCE CHAMBERLAIN, APPELLEE.
82 N. W. 2d 632

Filed April 19, 1957. No. 34163.

1. **Judgments.** The function of a nunc pro tunc order is not to correct some affirmative action of the court which ought to have been taken, but its purpose is to correct the record which has been made, so that it will truly express the action taken but which through inadvertence or mistake was not truly recorded.
2. **Trial.** If the evidence is insufficient to sustain a verdict in favor of the plaintiff, the trial court may instruct a verdict for defendant or discharge the jury and dismiss the case.
3. ———. A motion of a litigant to dismiss because of insufficiency of evidence to sustain a recovery has the identical purpose and should be treated the same as a motion for a directed verdict.
4. **Appeal and Error.** An order of the district court sustaining a demurrer to a cause of action and dismissing it with or without prejudice is a final order and is appealable.
5. ———. This court cannot have jurisdiction of an appeal from the district court unless, as required by section 25-1912, R. R. S. 1943, a notice of appeal is filed in the office of the clerk of the district court and the docket fee is deposited with the clerk within 1 month after the rendition of the judgment or decree, or the making of the final order, or within 1 month from the denial of a motion for a new trial timely filed in the cause.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Appeal dismissed.*

Eisenstatt, Seminara & Lay and *Donald P. Lay*, for appellant.

Wear, Boland & Mullin and *A. Lee Bloomingdale*, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

The third cause of action in the amended petition, with which this appeal is concerned, states that on June 7, 1952, appellant was a passenger in an automobile driven

by her husband; that appellee negligently operated the automobile she was then driving and caused it to collide on the wrong side of the highway with the automobile of the husband of appellant; that he was thereby injured and as a result thereof lost the part of his left arm from immediately below the elbow; and that because of the injury to her husband appellant has been damaged by reason of the loss of services of her husband and loss of consortium including society and companionship which appellant would normally expect and have reason to receive by virtue of their marital relationship.

By general demurrer appellee contested the legal sufficiency of the third cause of action to state a case against her in favor of appellant. It was, on August 30, 1956, a day of the May 1956 term of the court, sustained and a judgment of dismissal without prejudice of the third cause of action was rendered. Thereafter, on October 15, 1956, a day of the October 1956 term of the court, the district court ordered that the ruling of August 30, 1956, should be and it was "amended nunc pro tunc as of August 30, 1956 as follows: Demurrer of defendant to plaintiff's 3rd cause of action in amended petition sustained and 3rd cause of action dismissed with prejudice." The notice of appeal of appellant was filed November 14, 1956.

The parties to this cause disagree as to the nature and effect of the order of the trial court sustaining the demurrer of appellee and dismissing the third cause of action without prejudice. Appellant thinks it was not a final order and would not therefore have supported an appeal to this court. Appellee believes it was a final order and was appealable.

The order of August 30, 1956, was written in the journal of the court on the date it was made. This was in the May 1956 term of the court. It provoked no attention or action until October 15, 1956, which was after the commencement of the October 1956 term of the court and more than 1 month after the entry of the order.

There was no attempt to appeal from the order of dismissal of the cause of action without prejudice. There was no written application filed seeking action nunc pro tunc by the court but on October 15, 1956, it was by the court ordered "that ruling of August 30, 1956 is amended nunc pro tunc as of August 30, 1956 as follows: Demurrer of defendant to plaintiff's 3rd cause of action in amended petition sustained and 3rd cause of action dismissed with prejudice." The only change made was a substitution of the word "with" for the word "without."

The record is convincing that the entry of the order of August 30, 1956, was strictly correct and that it truly and fully recites the precise order made in the case on that date. There is no claim made now that the court on that date intended to or did dismiss the third cause of action with prejudice. The record and the statements of appellant indicate convincingly that the journal of the court correctly records and evidences the exact order the court intended to and did make on August 30, 1956.

Appellant says it has always been her contention that there was not a valid order to appeal from "as of the date of the August 30th entry." The proceeding of October 15, 1956, was to amend the order of August 30, 1956, "so that the Appellant might have an appealable order to bring before this Court." The precise purpose of obtaining the entry of October 15, 1956, was to correct the entry of August 30, 1956, "so that there was a dismissal upon the merits of the case, which * * * would then be a proper and appealable order." It is simply the contention of appellant that where a court enters an order which it has no statutory authority to do, "then that portion of the order which the court did not have authority to make is a nullity until corrected at a subsequent date." It could hardly be made more certain that the order of August 30, 1956, was "corrected at a subsequent date" by the substitution of a new and different order from that which was made and duly re-

corded on the date of the first action of the court. There was no order made on that date which was not correctly recorded. The result was that it could not be corrected nunc pro tunc because the order was correct as it was spread upon the journal. The purpose of a nunc pro tunc order is to make the record evidence the truth and not to exhibit a misrepresentation. In North Loup River P. P. & I. Dist. v. Loup River P. P. Dist., 149 Neb. 823, 32 N. W. 2d 869, it is said: "The proper function of a nunc pro tunc order is not for the purpose of correcting some affirmative action of the court which ought to have been taken, but its true purpose is to correct the record which has been made, so that it will truly record the action really had, but which through some inadvertence or mistake has not been truly recorded." See, also, Fisher v. Minor, 159 Neb. 247, 66 N. W. 2d 557; Watson Bros. Transp. Co. v. Red Ball Transf. Co., 159 Neb. 448, 67 N. W. 2d 475.

The assertions of appellant that there was not a valid order to appeal from as of the date of the August 30, 1956, entry; that the purpose of the proceeding of October 15, 1956, was to amend the former so that there could be an appealable order to bring to this court; and that the fact that the time for appeal had elapsed before October 15, 1956, make appropriate the following from Morrill County v. Bliss, 125 Neb. 97, 249 N. W. 98, 89 A. L. R. 932: "It is obvious from the history of this case that the purpose in vacating the original decree and reentering the same decree was to extend the time for perfecting an appeal. The legislature has general power to fix the time limit for taking an appeal, and having prescribed such time, the trial court has no power to extend the time directly or indirectly." The order of October 15, 1956, did not extend the time within which to prosecute an appeal in this case. It is neither significant nor important.

The argument of appellant is that the words in the order of August 30, 1956, "and said Third Cause of

Action dismissed without prejudice" were superfluous since the court had no authority to make such a decision under the state of the record; that the demurrer assailed the third cause of action for insufficiency of statement of facts to constitute a cause of action; and that an action may be dismissed without prejudice only upon five statutory grounds and that failure of the petition to state a cause of action is not one of them. The gist of this claim is that the order of the court was effective only to sustain the demurrer and that such an order is not appealable. The conclusion is undeniable if the premise is not faulty. Koehn v. Union Fire Ins. Co., 151 Neb. 859, 39 N. W. 2d 808; Shipley v. Shipley, 154 Neb. 872, 50 N. W. 2d 103.

The statutory grounds for dismissal of an action without prejudice to a future action are: By plaintiff before final submission of the case; and by the court if the plaintiff fails to appear at the trial, for want of necessary parties, on application of some of the defendants if there are others whom the plaintiff fails to diligently prosecute, or for disobedience by plaintiff of an order concerning the proceedings in the action. In all other cases on the trial of the action a decision must be upon the merits. § 25-601, R. R. S. 1943. Appellant insists that dismissal without prejudice of the third cause of action was not directed or permitted by the statute but, on the contrary, that the mandate thereof was that any dismissal of it must be "upon the merits of the action" so that the case would be finally disposed of in that court. It is urged by appellant that this court has pointed out that if a trial court dismisses an action without prejudice upon a ground other than stated in the statute, its action in this regard is without authority. In Zittle v. Schlesinger, 46 Neb. 844, 65 N. W. 892, it is said: "Under our code a trial court has no authority to enter an involuntary nonsuit and judgment of dismissal, because the plaintiff fails by his evidence to establish his cause of action. In such case the proper

practice is to instruct the jury to return a verdict for the defendant." The opinion made reference to section 430 of the Code of Civil Procedure, which is identical with the provisions of the statute last above referred to, and stated: "By virtue of this section, in the five cases stated, a judgment of dismissal without prejudice may be entered by the court; and by the last sentence of the section such a judgment cannot be entered in other cases. * * * Where the evidence is insufficient to warrant a verdict for the plaintiff the court may, and should, instruct the jury to return a verdict for the defendant; but it has no authority without a verdict to enter a nonsuit and judgment of dismissal." That decision was approved and applied in Thompson v. Missouri Pacific Ry. Co., 51 Neb. 527, 71 N. W. 61. However, it should be observed that in each of those cases this court said that where the evidence entitled the defendant to have a verdict so directed it was error without prejudice to the plaintiff that the trial court entered a nonsuit. It is obvious, therefore, that this court did not determine that the district court was without jurisdiction to render a judgment of dismissal.

The cases discussed above have not been in this respect by express language disapproved or overruled. They have been, if not repudiated, disregarded by numerous subsequent decisions. It is said in Campbell v. Columbia Casualty Co., 125 Neb. 1, 248 N. W. 690: "Where the evidence is insufficient to sustain a verdict in favor of the plaintiff, the trial court may give a peremptory instruction in favor of defendant or excuse the jury and enter a nonsuit." See, also, Rzeszotarski v. American Smelting & Refining Co., 133 Neb. 825, 277 N. W. 334; Bauer v. Wood, 144 Neb. 14, 12 N. W. 2d 118; Kline v. Metcalfe Construction Co., 148 Neb. 357, 27 N. W. 2d 383; Hammer v. Estate of Hammer, 155 Neb. 303, 51 N. W. 2d 609; McLeod v. Andrew Murphy & Son, Inc., 155 Neb. 318, 51 N. W. 2d 620. The conclusion has more recently been expressed that a motion of a litigant to

dismiss because of insufficiency of evidence to sustain a recovery has the same purpose and is treated the same as a motion for a directed verdict in the district court and in this court on appeal. Wax v. Co-Operative Refinery Assn., 154 Neb. 42, 46 N. W. 2d 769, sustains this view: "A motion to dismiss on the ground that the evidence does not sustain a cause of action for all practical purposes is the same as a motion for directed verdict and this court has uniformly so treated it." The district court had jurisdiction to made the order that the cause of action was insufficient as a matter of law and that it should be and was dismissed without prejudice.

This court is authorized to review and take lawful action in reference to a judgment or final order of the district court for errors exhibited by the record of the case. § 25-1911, R. R. S. 1943. An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, is a final order. § 25-1902, R. R. S. 1943. Rehn v. Bingaman, 157 Neb. 467, 59 N. W. 2d 614, defines a final order in this language: "The law * * * is that an order is final for the purposes of an appeal when it determines the rights of the parties * * *." A dismissal of a cause of action is the equivalent of a discontinuance of it in the court. It is thereby sent out of court. The rights of the parties in the cause of action are determined insofar as the court rendering the order of dismissal is concerned. Temple v. Cotton Transfer Co., 126 Neb. 287, 253 N. W. 349.

Davis v. Jennings, 78 Neb. 462, 111 N. W. 128, concerned an order of the trial court which sustained special appearances of defendants that contested the jurisdiction of the court over the person of each of them and dismissed the case without prejudice. This court in deciding that it was an appealable order in the case said: "In conclusion, it is insisted that the order quashing the service was not a final order, and was therefore not appealable. Without stopping to inquire whether an order quashing service is a final order, it is suffi-

cient to say that the judgment of dismissal was a final judgment. It enabled the plaintiff to appeal, and thus bring the case here for a review of the whole proceeding." See, also, Hamsher v. Fisher, 133 Neb. 854, 277 N. W. 380.

The order of August 30, 1956, was a final order in the case. Appellant could have presented the error she now argues concerning the validity of the third cause of action stated in the amended petition by a timely appeal from that adjudication.

The notice of appeal was filed November 14, 1956, much more than 1 month after the rendition of the order of August 30, 1956, dismissing the third cause of action. This court is without jurisdiction to entertain an appeal from the district court unless notice of appeal is filed and the docket fee is deposited within 1 month of the making of the judgment, decree, or final order in the cause. This is fundamental and mandatory. § 25-1912, R. R. S. 1943; Sloan v. Gibson, 156 Neb. 625, 57 N. W. 2d 167; Powell v. Van Donselaar, 160 Neb. 21, 68 N. W. 2d 894. There has been conferred upon this court no jurisdiction of this appeal and it is without authority to consider and decide any other matter attempted to be presented.

This appeal should be and it is dismissed and the costs should be taxed to appellant.

APPEAL DISMISSED.

HERBERT F. BULLER ET AL., APPELLANTS, V. CITY OF OMAHA, A MUNICIPAL CORPORATION OF THE METROPOLITAN CLASS, ET AL., APPELLEES.
82 N. W. 2d 578

Filed April 19, 1957. No. 34167.

1. **Pleading.** A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, rele-

vant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact.

2. ———. In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof, if the allegations stated therein either aid the petition in stating a cause of action or charge facts going to avoid liability on the part of the defendant.

3. **Constitutional Law: Municipal Corporations.** The mandate prescribed in Article III, section 5, Constitution of Nebraska, gives the Legislature exclusive power and authority to legislatively divide the state into legislative districts. It prescribes the time and manner of so doing, and annexation ordinances enacted by municipalities as authorized by and in conformity with statutes relating thereto cannot and do not change the territorial boundaries of legislative districts theretofore established by the Legislature.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Affirmed.*

George B. Boland, Harry B. Otis, and *A. Clark Murdock,* for appellants.

Edward F. Fogarty, Eugene F. Fitzgerald, John C. Burke, Bernard E. Vinardi, Neal H. Hilmes, and *Irving B. Epstein,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiffs, Herbert F. Buller, Robert F. Clauss, Max E. Freeman, and Robert E. Wear, for themselves and others similarly situated, brought this action against defendants, City of Omaha, a municipal corporation of the metropolitan class located in Douglas County, its named mayor and city councilmen, the named county commissioners, county clerk, and county assessor of Douglas County, and the named treasurer of said city and county, seeking to have annexation ordinance No. 18906, enacted by the city council, declared to be unconstitutional and void as in violation of Article III, section 5, Constitution of Nebraska. In such respect, plaintiffs' theory was that

"although otherwise lawful," the ordinance allegedly changed the territorial boundaries of legislative districts Nos. 9 and 10 in which the annexed lands lie. Plaintiffs also sought to enjoin enforcement of said ordinance and obtain general equitable relief. Defendants filed general demurrers to plaintiffs' petition, which the trial court sustained. Thereupon plaintiffs elected to stand upon their petition and, having refused to further plead, the trial court dismissed their petition. Thereafter, plaintiffs' motion for new trial was overruled and they appealed, assigning that the trial court erred in sustaining defendants' demurrers and dismissing their petition. We conclude that the assignment has no merit.

Plaintiffs' petition may be summarized as follows: They alleged that plaintiffs were residents of Douglas County and owners in possession of real estate within the area described in annexation ordinance No. 18906, a copy of which was attached to and made a part of their petition, and that this action was brought on behalf of themselves and all other persons similarly situated.

They alleged that defendant city of Omaha was a city of the metropolitan class, located in Douglas County, and that the other named defendants were respectively mayor and city councilmen of Omaha, county commissioners, county clerk, and county assessor of Douglas County, and treasurer of Douglas County and the city of Omaha. They alleged that said city is governed by a home rule charter under the Constitution and laws of Nebraska, which charter, with the exception of immaterial amendments, is found in Chapter 14, R. R. S. 1943, wherein the sections relating to the power and authority of defendant city and its council in the matter of extending its corporate limits by annexation of territory will be found.

Plaintiffs alleged that on July 3, 1956, defendant city council purported to pass annexation ordinance No. 18906; that defendants and each of them contend that said ordinance was duly passed and is a valid and sub-

sisting ordinance of defendant city; and that unless restrained and enjoined, they will enforce same upon the area therein described, and such area will be considered and dealt with as a part of the city of Omaha.

Plaintiffs' petition then recited the provisions of Article III, section 5, Constitution of Nebraska, and alleged that pursuant thereto the Nebraska State Legislature at its 1935 session enacted applicable section 5-104, R. R. S. 1943, which divided the State of Nebraska into 43 legislative districts, each consisting of certain described territory, and provided that each legislative district should be entitled to one member.

Thereafter, plaintiffs recited the provisions of said section, which legislatively described the territory included in legislative districts Nos. 9 and 10, and alleged that purported ordinance No. 18906 violated the integrity of such legislative districts by changing the corporate limits of the city of Omaha between Pacific Street and Howard Street, and between Pacific Street and Charles Street, and in so doing, it changed the territorial boundaries of legislative districts Nos. 9 and 10 in direct violation of Article III, section 5, Constitution of Nebraska, and laws of the state, which deprived plaintiffs of the right to vote for the legislative candidate for legislative district No. 10, a privilege theretofore enjoyed by them.

In Cacek v. Munson, 160 Neb. 187, 69 N. W. 2d 692, we reaffirmed that: "A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact.

"In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof, if the allegations stated therein either aid the petition in stating a cause of action or charge facts going to avoid liability on the part of the defendant."

The exclusive mandate requiring the Legislature to divide the state into legislative districts and prescribing

the time and manner of their creation is found in Article III, section 5, Constitution of Nebraska, which provides as follows: "At the regular session of the Legislature held in the year nineteen hundred and thirty-five the Legislature shall by law determine the number of members to be elected and divide the state into Legislative Districts. In the creation of such Districts, any county that contains population sufficient to entitle it to two or more members of the Legislature shall be divided into separate and distinct Legislative Districts, as nearly equal in population as may be and composed of contiguous and compact territory. After the creation of such districts, beginning in nineteen hundred and thirty-six and every two years thereafter, one member of the Legislature shall be elected from each such District. The basis of apportionment shall be the population excluding aliens, as shown by next preceding federal census. In like manner, when necessary to a correction of inequalities in the population of such districts, the state may be redistricted from time to time, but no oftener than once in ten years."

Pursuant to that concededly exclusive power and authority, the Legislature proceeded to divide the state into legislative districts by enacting Laws 1935, chapter 109, section 1, page 350, which is now section 5-104, R. R. S. 1943.

As here involved, that section provides: "District No. 9. Includes the following territory in the county of Douglas and the city of Omaha: North from Pacific to Howard, between the western corporate limits and 60th Street; north from Pacific to Dodge, between 56th and 60th Streets; north from Pacific to Charles, between the western corporate limits and 56th Avenue; north from Leavenworth to Charles, between 46th Avenue and 36th Street; north from Leavenworth to Cuming, between 30th and 36th Streets; north from Leavenworth to Farnam, between 30th and Park Avenue.

"District No. 10. Includes the following territory in

the county of Douglas and the city of Omaha: North from Charles to Blondo, between western corporate limits and 49th Street; north from Blondo to Lake, between 66th Street and 50th Street; all north of Lake between 72nd Street and 48th Street; and all of the rural precincts."

Annexation ordinance No. 18906, as authorized by section 14-117, R. R. S. 1943, extended the corporate limits of the city of Omaha over certain extensively described lands in Douglas County. It incorporated such lands into and made same a part of the city of Omaha, and repealed any and all ordinances insofar as they conflicted with that ordinance. Its provisions are too verbose to recite in this opinion. It is sufficient for us to say that its provisions made no reference whatever to and in no manner attempted either directly or indirectly to change the boundaries of territory legislatively included in the legislative districts as prescribed aforesaid by section 5-104, R. R. S. 1943.

We find no essential connection between annexation ordinance No. 18906 and section 5-104, R. R. S. 1943, which defines and fixes the territory included in legislative districts Nos. 9 and 10. Any reference in the latter to "corporate limits" is simply descriptive and casual but fixes their permanent legislative territorial boundary lines. To hold otherwise would require us to read into section 5-104, R. R. S. 1943, a legislative intention to bar annexation under previously enacted section 14-117, R. R. S. 1943, beyond the lines at which the "corporate limits" form a common boundary. We find no such legislative intention. The two statutes are not conflicting but may be harmonized by logically concluding that the Legislature had no intention by using the expression "corporate limits" to limit the annexation statutes beyond any possibility of reasonable operation which would lead to palpable injustice or absurdity. In Kelley v. Gage County, 67 Neb. 6, 93 N. W. 194, affirmed on rehearing at 67 Neb. 11, 99 N. W. 524, and

reaffirmed in State ex rel. Reed v. Grimes, 98 Neb. 762, 154 N. W. 544, this court stated the applicable rule as follows: "In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity."

Article III, section 5, Constitution of Nebraska, requires that legislative districts shall be "separate and distinct." Those words require that the boundaries of a legislative district shall be fixed boundaries and the only manner in which such boundaries can be changed is by legislative action and then "no oftener than once in ten years." Therefore, when the Legislature fixed the boundary lines of legislative district No. 9 in part as "North from Pacific to Howard, between the western *corporate limits* and 60th Street" (italics supplied) in the city of Omaha, and the boundary lines of legislative district No. 10 in part as "North from Charles to Blondo, between western *corporate limits* and 49th Street" (italics supplied) in the city of Omaha, they must be construed to mean the corporate limits of the city as they existed at the time of the adoption of section 5-104, R. R. S. 1943, until further appropriate action is taken by the Legislature as authorized by Article III, section 5, Constitution of Nebraska. In other words, the boundaries of legislative districts Nos. 9 and 10 in Douglas County and the city of Omaha must remain as originally established until changed by the Legislature in the manner provided by Article III, section 5, Constitution of Nebraska, and they cannot be changed or affected in any manner by any changes in the corporate limits of the city of Omaha by its annexation ordinances.

As stated in 50 Am. Jur., Statutes, § 236, p. 224: "Because it is easy to be wise after one sees the results of experience, there is always a tendency, it has been said, to construe the language of a statute in the light in which it appears when the construction is given. Such an approach to the question is erroneous. Since, in de-

termining the meaning of the terms of a statute, the aim is to discover the connotation which the legislature attached to the words, phrases, and clauses employed, the words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted, and the statute must be construed as it was intended to be understood when it was passed." That statement has application here.

Issues comparable with those presented in the case at bar were raised and like conclusions were reached in the recent case of Fish Creek Park Co. v. Village of Bayside (Wis.), 80 N. W. 2d 437. In that opinion, quoting from Town of Greenfield v. City of Milwaukee, 273 Wis. 484, 78 N. W. 2d 909, the court said: " 'Another immediate answer to the Town's argument is that the effect of its argument, if good, would only render void the changed boundaries of the legislative districts. It would not invalidate the annexation, which is the question now before us.' " Thereafter, the opinion went on to say: "That determines the question before us. We affirm the trial court's determination that the annexation proceedings were valid and that the annexed area in the town of Mequon remains a part of the Ozaukee county assembly district. Provision will have to be made by the village so that persons residing in the annexed area may vote for candidates for the assembly in the Ozaukee county district."

That precedent has logical application here. By analogy, ordinance No. 18906, which is otherwise concededly valid, is not unconstitutional as in violation of Article III, section 5, Constitution of Nebraska, because the territory thereby annexed to the city of Omaha remains a part of the legislative districts prescribed by section 5-104, R. R. S. 1943. Lawful provision will have to be made so that persons residing in such annexed territory may vote for legislative candidates in such districts. In that connection, authorities relied upon by plaintiffs are entirely distinguishable upon the facts,

applicable statutes, and constitutional provisions unlike our own.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed. All costs are taxed to plaintiffs.

AFFIRMED.

DOYLE M. CARLSON, APPELLANT, V. ANNA SCHROEDER ET AL., APPELLEES.
82 N. W. 2d 416

Filed April 19, 1957. No. 34183.

Attachment: Malicious Prosecution. In the absence of malice, an action for the wrongful suing out of an attachment can be maintained alone on the attachment bond. To maintain an action independently of the statute, and not on the bond, malice in suing out the writ and want of probable cause must be averred.

APPEAL from the district court for Morrill County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Paul Rhodes, for appellant.

Townsend & Youmans, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action brought in the district court for Morrill County by Doyle M. Carlson, plaintiff, to recover damages for wrongful attachment against Anna Schroeder as attaching creditor, Earl Yeoman, the sheriff of Morrill County, and Paul Hair, deputy sheriff of said county. The defendants demurred to the plaintiff's petition on the ground that the facts stated therein were insufficient to constitute a cause of action. This demurrer was sustained. The plaintiff refusing to plead further, the trial court dismissed the plaintiff's action. From this order, the plaintiff appeals.

The plaintiff's petition, insofar as it need be considered in this appeal, alleged in substance that Earl Yeoman was the duly elected, qualified, and acting sheriff of Morrill County, and Paul Hair was the duly acting and qualified deputy sheriff of said county from August 19, 1952, to November 23, 1952; that on August 19, 1952, Anna Schroeder commenced an action for attachment in the county court of Morrill County against the plaintiff, Doyle M. Carlson, for money damages; that thereafter, on August 19, 1952, Earl Yeoman and Paul Hair proceeded to the premises of the plaintiff and then and there did take possession of certain livestock and a saddle, all being property of the plaintiff; and that thereafter the plaintiff filed various motions for dissolution of attachment, the last of such motions being filed in the district court on October 18, 1952. This motion was predicated on section 25-1008, R. R. S. 1943. The petition further alleged that the attachment be dissolved for the reason that the execution of the order of attachment by the sheriff was not made in the presence of two residents of the county as required by said section. The attaching creditor resisted this motion. The trial court sustained the motion and the property attached by the sheriff was discharged from the attachment. The petition further set forth that the sheriff and his deputy, from August 19, 1952, to November 22, 1952, wrongfully held livestock belonging to the plaintiff and improperly cared for such livestock. In addition, the petition set forth other elements of damage alleged to have been suffered by the plaintiff by reason of the wrongful attachment, and prayed for damages.

For convenience we will refer to the parties as they were designated in the district court.

The plaintiff assigns as error that the trial court committed prejudicial error in sustaining the demurrer of the defendants and dismissing the plaintiff's action.

The question to be determined in this appeal is whether or not the plaintiff's petition states a cause of action for

damages for wrongful attachment against the attaching creditor, the sheriff, and the deputy sheriff of Morrill County.

At the outset it might be said that section 25-1008, R. R. S. 1943, was violated by the sheriff as heretofore set forth.

The plaintiff's petition contains no allegation to the effect that he brought the present action upon any attachment bond, or that his action was brought upon the official bond of the sheriff or his deputy.

This is an action for wrongful attachment. Section 25-1003, R. R. S. 1943, provides in part that: "* * * the plaintiff shall pay the defendant all damages which he may sustain by reason of the attachment if the order be wrongfully obtained."

In Storz v. Finklestein, 48 Neb. 27, 66 N. W. 1020, this court held: "In the absence of malice, an action for the wrongful suing out of an attachment can be maintained alone on the attachment bond. To maintain an action independently of the statute, and not on the bond, malice in suing out the writ and want of probable cause must be averred and shown." While this case was reversed in part on rehearing, 50 Neb. 177, 69 N. W. 856, such reversal did not change the rule as set forth in this opinion and as shown by other authorities cited herein.

In Jones v. Fruin, 26 Neb. 76, 42 N. W. 283, the court held: "To sustain an action for malicious attachment of property, it is necessary to prove want of probable cause, malice, and damage to the plaintiff from the issuing of the attachment." See, also, Parmer v. Keith, 16 Neb. 91, 20 N. W. 103.

As stated in Storz v. Finklestein, *supra:* "In an action upon the attachment undertaking, malice need not be either alleged or proven. We have no statute in this state which permits an attaching debtor to recover damages for the mere wrongful suing out of a writ of attachment, except upon the bond; and, in the absence of such a statutory provision, such an action cannot be

maintained." But, where the plaintiff does not sue upon the bond, but independent of it, then the action is one in the way of an action for malicious attachment, in which case the plaintiff would be compelled to allege and prove want of probable cause and malice. See Jones v. Fruin, *supra.*

Independently of statute and aside from the remedy on the bond, an action can be maintained against the attaching plaintiff for a wrongful and malicious attachment, and the action is similar to one for malicious prosecution and governed by substantially the same rules. Both malice and want of probable cause must be shown. Jones v. Fruin, *supra;* Storz v. Finklestein, *supra.* In the absence thereof, the only remedy is upon the attachment bond, there being no liability for wrongful attachment as such. See 1 Fisher, Courts of Limited Jurisdiction, § 134, p. 227.

In Mitchell v. Silver Lake Lodge, 29 Or. 294, 45 P. 798, the court held: "In an action for unlawful attachment, not brought upon the attachment bond, the complaint must allege that the attachment was sued out maliciously and without probable cause, * * *." The court further said: "It is certain that a defendant who has sustained an injury by the attachment of his property maliciously and without probable cause, has two remedies for the recovery of his damages,—first, by an action on the undertaking; and, second, by an action for the malicious attachment."

As stated in Vesper v. Crane Co., 165 Cal. 36, 130 P. 876, L. R. A. 1915A 541: "When, however, the attachment defendant undertakes to proceed against the attachment plaintiff alone and independent of any right of action upon the bond, he must allege and show malice and want of probable cause on the part of the attachment plaintiff as required by the principles of the common law in actions for malicious prosecution. The averment of malice and want of probable cause go to the very gist of the action by the attachment defendant, and

no recovery can be had unless these essential elements of liability are alleged and established by the evidence."

There is no averment in the plaintiff's petition that the attaching creditor maliciously and without probable cause procured the attachment to be issued and levied. Therefore, cause of action is not made as against the attaching creditor. The plaintiff's petition does not allege that the attachment was obtained by any of the defendants without probable cause, and does not allege malice on the part of any of the defendants.

For the reasons herein given, we conclude that the judgment of the trial court in sustaining the defendants' demurrer to the petition of the plaintiff and dismissing the plaintiff's action was correct and should be, and is hereby, affirmed.

AFFIRMED.

HARLEY A. SIPPRELL, APPELLEE, V. MERNER MOTORS ET AL., APPELLANTS.
82 N. W. 2d 648

Filed April 26, 1957. Nos. 34078 and 34083.

1. **Landlord and Tenant.** In the absence of an express covenant or stipulation a lessor is not bound to make repairs to leased property.
2. ———. Subject to limited exceptions, the general rule is that guests and invitees of a tenant derive their right to enter upon leased premises through the tenant, and have the same but no greater right to proceed against the landlord for personal injuries resulting from alleged defects on the premises than the tenant has.
3. ———. The exceptions contemplated by the foregoing statement of principle generally have no relation to conditions arising after leasing and surrender of control but only to those existing at the time of leasing.
4. ———. Subject to specific exceptions, the lessor of land is not liable for bodily harm caused to his lessee, or others upon the demised land with the consent of the lessee or sublessee, by any dangerous condition, whether natural or artificial, which existed when the lessee took possession.

5. **Municipal Corporations: Negligence.** A lot owner in the city of Omaha is not required to repair an adjacent sidewalk until he has been notified by the city to do so, and in the absence of such notice he is not liable to pedestrians for damages for personal injuries.
6. ———: ———. A lot owner may be held in damages where defects in a sidewalk have been caused by his affirmative wrong doing or wrongful use of a sidewalk.
7. **Negligence.** In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it.
8. ———. The proprietor of a salesroom is not an insurer against accidents to customers, but is bound to exercise reasonable care and prudence to keep the premises, which the public is tacitly invited to use, safe for that purpose.
9. ———. The fact that an invitee falls upon steps leading from the exit of a building to the sidewalk below does not raise any presumption of negligence on the part of its owner, and the doctrine of res ipsa loquitur does not apply.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Reversed and remanded with directions.*

Fraser, Crofoot, Wenstrand, Stryker & Marshall, Kennedy, Holland, DeLacy & Svoboda, and *William P. Mueller,* for appellants.

Robert W. Haney and *Thomas J. Walsh,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action for damages for personal injuries and medical treatment by Harley A. Sipprell, plaintiff and appellee, against Merner Motors, N. Burt Merner, Gilbert C. Merner, and J. F. Bloom & Company, a corporation, defendants and appellants. The action was tried to a jury and a verdict was returned against all defendants for $4,500. Judgment was rendered on the verdict. The defendants Merner filed a motion for new trial as did also the defendant J. F. Bloom & Company.

J. F. Bloom & Company also filed a motion for judgment notwithstanding the verdict. These motions were overruled. From the judgment and the order overruling the motions separate appeals have been taken. The appeals have been consolidated. The defendants Merner will be hereinafter referred to as Merner Motors and J. F. Bloom & Company will be referred to as Bloom.

As grounds of action the plaintiff by petition pleaded, to the extent necessary to set forth herein, that on September 2, 1953, Merner Motors were doing business at Twentieth Street and Ames Avenue in Omaha, Nebraska, in a building leased from Bloom; that on that date plaintiff was a customer and while leaving the premises by a regular exit he stepped from the doorway onto a step just outside from which he stepped to the sidewalk and fell whereby he sustained serious and permanent injuries; that the step was broken, worn, and irregular, and projected such a short distance from the door itself that the sudden drop to the pavement constituted a hazard to one leaving the doorway; that the plaintiff in encountering the step by reason of its condition was caused to partially lose his balance and forced to step onto a portion of the sidewalk immediately below the step which walk was broken and uneven, on account of which he completely lost his balance and fell to the sidewalk; that the step and sidewalk had remained in the condition described for a long time prior to the accident which condition was known to all of the defendants; and that the proximate cause of the accident and injuries to the plaintiff was the negligence of the defendants in failing to provide a safe means of exit from the building and in failing to warn plaintiff of the condition of the step and sidewalk.

The defendant Bloom filed a separate answer. In the answer it denied any negligence on its part. It alleged that the plaintiff was guilty of contributory negligence; that the sidewalk was owned by the city of

Omaha and that this defendant was under no obligation to repair the sidewalk even if repairs were necessary, which it denied, in the absence of notice by the city; that it had never been notifed to make repairs; that in no event was it chargeable with negligence on account of the condition of the step or the sidewalk; that the step was not defective; and that the step was in plain sight and that the risk, if any, was assumed by plaintiff.

Merner Motors filed a separate answer. By the answer negligence was denied and contributory negligence was charged against the plaintiff. By the answer it was alleged substantially that no repairs were necessary; that the entrance was in open and constant use and the condition of it was in plain sight; that as tenants they were not required or permitted to make repairs; that the area west of the building was a sidewalk owned by the city of Omaha; and that they had received no notice to make repairs.

The plaintiff filed a reply in which he generally denied the allegations of the answers which did not amount to admissions of the allegations of the petition. The trial was had upon the issues thus joined. The result has already been pointed out. As pointed out Bloom and Merner Motors have taken separate appeals. Each has assigned numerous errors which it is contended are grounds for reversal. The assignments of error advanced by Bloom, to the extent necessary to a determination of the appeal, will be considered first herein.

By the first four assignments of error the propriety of the rulings on the motions for directed verdict, the motion for new trial, and the motion for judgment notwithstanding the verdict were attacked.

The question presented collectively by these assignments is that of whether or not, assuming that the plaintiff had a right of action against some one, he had a right against Bloom on account of the condition of the step or condition of the sidewalk or both. Bloom insists that he did not.

One proposition substantially urged in this connection is, assuming that the step is to be regarded as on the premises occupied by Merner Motors, that no responsibility for its condition devolved upon Bloom, the lessor, unless it was shown that the dangerous condition existed at the time of leasing which condition was known at that time; that there was an obligation upon the lessor to repair and keep in repair; and that it had sufficient control for that purpose. Bloom contends that it has not been shown that these conditions or any of them did or were known to exist at the time of leasing.

The factual contention of Bloom in this respect must be accepted as true. There was no effort made to show that the condition of which plaintiff complains was in existence at the time of leasing which was in 1949.

No authorities have been cited the effect of which is to say that a lessor is under any obligation to repair conditions on leased premises which are under the exclusive control of a lessee which came into being after the lessee went into possession. The rule in this jurisdiction is to the contrary. In Bartholomew v. Skelly Oil Co., 144 Neb. 51, 12 N. W. 2d 122, it was said: "In the absence of an express covenant or stipulation a lessor is not bound to make repairs to leased property." This was quoted with approval in Quist v. Duda, 159 Neb. 393, 67 N. W. 2d 481.

This being true it must be said under the facts that the plaintiff had no right of action against Bloom on account of the alleged dangerous condition. This is so because he had no greater right than the lessee would have had, and the lessee would have had no right at all.

In Van Avery v. Platte Valley Land & Investment Co., 133 Neb. 314, 275 N. W. 288, it was said: "Subject to limited exceptions, the general rule is that guests and invitees of the tenant derive their right to enter upon the premises leased through the tenant, and have the same but no greater right to proceed against the land-

lord for personal injuries resulting from alleged defects on the premises than the tenant has."

A reading of the opinion discloses that the exceptions contemplated by this statement have no relation to conditions arising after leasing and surrender of control but only to those existing at the time of leasing.

In the same case with reference to the lessee and others it was said: "Subject to specific exceptions, the lessor of land is not liable for bodily harm caused to his lessee, or others upon the demised land with the consent of the lessee or sublessee, by any dangerous condition, whether natural or artificial, which existed when the lessee took possession." The exceptions are those attaching to the previous quotation, namely, the obligation to make repairs and retention of control for that purpose. See, also, Nelson v. Hokuf, 140 Neb. 290, 299 N. W. 472.

In the light therefore of the failure of proof that the step was in a dangerous condition at the time the lease was entered into between Bloom and Merner Motors and proof that Bloom was under obligation to make repairs the plaintiff had no cause of action against Bloom based upon the condition of the step.

Another proposition urged by Bloom is that the sidewalk was the property of the city of Omaha; that as owner of the abutting property it had no obligation to repair in the absence of notice by the city so to do; and that it had never been so notified. This contention must be sustained.

In Andresen v. Burbank, 157 Neb. 909, 62 N. W. 2d 135, it was said: "A lot owner is not required to repair an adjacent sidewalk until he has been notified by the city to do so, and in absence of such notice he is not liable to pedestrians for damages for personal injuries." See, also, McAuliffe v. Noyce, 86 Neb. 665, 126 N. W. 82; Hanley v. Fireproof Building Co., 107 Neb. 544, 186 N. W. 534, 24 A. L. R. 382; Connolly v. City of Omaha, 159 Neb. 380, 66 N. W. 2d 916.

This of course is not to say that a lot owner may not be held in damages where defects in a sidewalk are caused by affirmative wrong doing nor negligent use by the lot owner. Andresen v. Burbank, *supra*. No such question is before the court in the case at bar.

In the light of these observations it becomes necessary to say that no cause of action was proved against the defendant Bloom and accordingly it is entitled to have its motion for judgment notwithstanding the verdict sustained. This makes unnecessary a consideration of any other assignments of error.

Turning now to Merner Motors, it is pointed out that at the close of the evidence of the plaintiff a motion was made for a directed verdict which was overruled. This motion was renewed at the close of all the evidence and again overruled. A motion for new trial was made and this was overruled.

By the first four of numerous assignments of error the sufficiency of the evidence to sustain a cause of action against Merner Motors has been challenged. Substantially Merner Motors contends that, assuming but not admitting that these defendants were required to keep in repair the step and the sidewalk in question and that for failure to do so they could be held in damages for negligence, the evidence was not sufficient in this case to prove a cause of action or a right of recovery against them. They urge that within the meaning of controlling principles of law there was absence of proof of any negligent act or omission, and also there was an absence of proof of proximate cause or of proximately contributing cause.

It is a well-settled rule that in an action for negligence, the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it. Brown v. Slack, 159 Neb. 142, 65 N. W. 2d 382.

As to the facts the evidence discloses that the acci-

dent in question happened around 1 to 2 o'clock p.m., on a bright day. It was at the regular exit or door on the west side of the showroom of the Merner Motors. The plaintiff was on the premises as a business invitee. The threshold was of stone or concrete as was a step outside and 6 or 7 inches below. The step outside was elevated several inches above a sidewalk which extended westward from the step. At the time in question an awning overhung the exit.

Coming now directly to the testimony of plaintiff relating to the causative factor he said that he stepped down on the step with his left foot and hit something with the sole of the left shoe, slipped, and was thrown forward over the edge of the step; that he went forward onto the sidewalk with his right foot and it turned and flopped over and he went down on his knees and hands; that after he got up he could see that the step and sidewalk were badly broken; that it was irregular like an indentation or a broken piece or cracked, with the edge rounded off and uneven; that the portions at the edge of the step were chipped out and it was wavy and uneven; that he could not quite figure out how it happened but it looked like there was an indentation where possibly a piece of concrete or stone had chipped out and it appeared that when he put his foot on it it threw him a little bit to the left and over the edge; that the chipped portion was, as he estimated, from ¾ to 1½ inches in depth; and that the sidewalk was badly broken and raised. As a part of his case-in-chief the plaintiff adduced in evidence photographs of the exit which included a view of the step in question and the adjacent sidewalk. On cross-examination he testified as to what happened on the step and that it was sort of slipping or tripping for just a few inches which threw him over the edge of the step.

This, it is believed, is a fair summary of the evidence from which a determination as to whether or not the plaintiff has sustained the burden of proving a cause

of action or, in other words, whether or not there is evidence that Merner Motors were guilty of negligence which was the proximate cause or proximately contributed to the accident of which plaintiff complains.

The determination of this question must be made in the light of certain rules in addition to those previously stated herein. One of these is the following: "* * * the proprietor of a store is not an insurer against accidents to customers, but is bound to exercise reasonable care and prudence to keep the premises, which the public is tacitly invited to use, safe for that purpose." Glenn v. Grant Co., 129 Neb. 173, 260 N. W. 811. See, also, Rankin v. J. L. Brandeis & Sons, 135 Neb. 86, 280 N. W. 260; Bowerman v. Greenberg, 142 Neb. 721, 7 N. W. 2d 711.

Another rule is the following: "The fact that an invitee falls upon the steps leading from the exit of a building to the sidewalk below does not raise any presumption of negligence on the part of its owner, and the doctrine of res ipsa loquitur does not apply." Thompson v. Young Men's Christian Assn., 122 Neb. 843, 241 N. W. 565.

The first question which must be answered is that of whether or not the plaintiff has sustained the burden of showing by his evidence that Merner Motors were guilty of negligence. The determination of it of course depends upon the probative effect of the evidence summarized including the photographs. The oral description in the testimony of witnesses of the condition of both the step and the sidewalk is indefinite and uncertain and gives no clear conception of either but it may be that taken alone this would be sufficient to sustain a charge of negligence against Merner Motors. There is however photographic evidence which makes the condition of both the step and the sidewalk reasonably apparent. As to the step the photographs show no break in the upper surface of the step or at any of its edges. The most that can be said is that this surface shows a

slightly depressed area, probably brought about by wear from usage over a period of years. As to the sidewalk the photographs do show a crack extending outward from the step with an unevenness of surface which becomes pronounced probably about 18 inches from the outer edge of the step. These photographs are so clear in outline that they must be accepted as a controlling portrayal of the condition of both the step and the sidewalk.

Allowing the step to get into the condition which has been disclosed, in the light of what this court has said, did not amount to actionable negligence on the part of Merner Motors. Thompson v. Young Men's Christian Assn., *supra,* was an action based upon alleged negligence on account of a condition including a depression in a step. In that case the depression was caused by usage. Its depth ranged from 7/16 of an inch to 1¾ inches. The court held to the view in that case that it was not negligence to allow continued use.

As to defects in sidewalks this court in Sullivan v. Chicago & N. W. Ry. Co., 128 Neb. 92, 258 N. W. 38, cited with approval the following from Northrup v. City of Pontiac, 159 Mich. 250, 123 N. W. 1107: "A grating which projects two inches or less above a sidewalk is not such a defect as to violate the duty of a municipality to keep its streets and walks in a condition of reasonable safety."

In the same case the following was quoted from Van der Blomen v. City of Milwaukee, 166 Wis. 168, 164 N. W. 844: "A slight depression in one block and an elevation in the adjoining block of a cement sidewalk, the difference in level being about one and one-quarter inches, was, as a matter of law, not an actionable defect."

In the light of this, assuming but not deciding that Merner Motors under certain circumstances could be held liable for negligence in the maintenance of the step and sidewalk in question, it must be said that in

this case there is no proof of actionable negligence by Merner Motors.

If however it should be said that there was proof of negligence still no right of recovery has been shown. There is an absence of proof of proximate cause. As has been pointed out the plaintiff is entitled to no presumption that his fall was caused by negligence on the part of Merner Motors.

The plaintiff gave no authentic information as to what caused him to slip on the step or on what his foot struck on the sidewalk. The effect of his testimony was to say that for some reason his left foot slipped on the step in consequence of which he stepped with his right foot onto the sidewalk and his ankle turned. Thereafter he looked at the step and at the walk. A fair statement, it is thought, is that after he looked at these he assumed that the condition of the step which he observed caused him to slip and he further assumed that with his right foot he stepped upon the defective place in the sidewalk.

In order to accept this assumption as proof of proximate cause would be to make applicable to this situation the doctrine of res ipsa loquitur. In Thompson v. Young Men's Christian Assn., *supra,* it has been pointed out that this may not be done.

It follows therefore that no cause of action was proved against Merner Motors. Accordingly the motion for new trial should have been sustained.

The judgment against J. F. Bloom & Company and against Merner Motors, N. Burt Merner, and Gilbert C. Merner is reversed. As to J. F. Bloom & Company the cause is remanded with directions to sustain the motion for judgment notwithstanding the verdict. As to Merner Motors, N. Burt Merner, and Gilbert C. Merner, since there is no motion for judgment notwithstanding the verdict, the cause is remanded for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

STILLINGER & NAPIER, A PARTNERSHIP, APPELLEE, V. CENTRAL STATES GRAIN COMPANY, INC., A CORPORATION, APPELLANT.

82 N. W. 2d 637

Filed April 26, 1957. No. 34084.

1. **Contracts.** Preliminary negotiations leading to the execution of an integrated agreement of uncertain meaning are admissible for the purpose of determining the intentions of the parties, the conditions existing at the time, and the objects thereby to be accomplished, but not to vary plain terms of the instrument.
2. **Corporations: Trusts.** An officer or director of a corporation occupies a fiduciary relation to the corporation and is treated by a court of equity as a trustee.
3. **Corporations: Fraud.** An officer or director of a corporation, being a fiduciary, is denied business relationship with it without complete and truthful disclosure of all material facts known to him concerning the transaction and the subject matter of it. A material nondisclosure by a fiduciary constitutes a misrepresentation and a fraud.
4. **Conspiracy.** A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.
5. ———. The principal element of conspiracy is an agreement or understanding between two or more persons to do a wrong to or inflict an injury upon another. It involves action and an intent to commit the act which results in the injury.
6. ———. A conspiracy, like other facts, may be proved by direct or circumstantial evidence, and one means of proof is by showing overt acts or representations of the individuals charged with conspiracy.
7. ———. A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must be, proved by a number of indefinite acts, conditions, and circumstances, which vary according to the purpose to be accomplished. If it be proved that defendants, by their acts, pursued the same object, although by different means, one performing one part and another another part, with a view to the attainment of the same object, the conclusion is justified that they were engaged in a conspiracy to effect that object.
8. ———. If a conspiracy between the parties is established, whatever was done in pursuance of it by one conspirator is considered as the act of all and all are liable irrespective of the fact of the extent to which they benefited thereby, since it is sufficient if the proof shows such concert of action in

commission of an unlawful act or such other facts from which a natural inference arises that the unlawful overt act was in furtherance of a common design of conspirators to commit the conspiracy.

9. **Contracts: Damages.** If a construction contract is substantially performed, the damage which the owner is caused by defective workmanship or unsuitable material used is measured by the fair and reasonable cost of remedying the defects.

APPEAL from the district court for Chase County: VICTOR WESTERMARK, JUDGE. *Reversed and remanded with directions.*

Neighbors & Danielson, James L. Macken, and *Beatty, Clarke, Murphy & Morgan,* for appellant.

Charles M. Bosley and *Robert C. Bosley,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

The action of appellee was for the recovery of a judgment of $21,750 and interest against appellant; an adjudication that it was a lien upon its grain storage facilities at Imperial, Nebraska; and for a foreclosure of the lien. The lien claimed included work and material furnished in the construction of grain facilities at Atwood, Kansas.

It was stated in the cause of action of appellee that it, as a subcontractor, on November 16, 1951, made a contract with Western Construction Company, trade name of Jack E. Mack, because of which appellee performed construction work on the Imperial and Atwood facilities; that payments for the period to April 1, 1952, were made; that appellee had not been paid for work done and materials furnished from April 1, 1952, to April 21, 1952; and that the amount owing therefor was the sum of $21,750.

The pleading of appellant upon which the case was tried was the second amended answer and cross-petition. It answered the petition of appellee by an admission of the contract of November 16, 1951, called the subcontract,

between it and Jack E. Mack; by a denial of all other matters set forth therein; and by allegations that the lien claimed by appellee was false and fraudulent, that the claim of lien was filed with dishonest design for the purpose of defrauding appellant and casting a cloud on the title to its property, that the claim of lien included items not furnished to the Imperial construction, and that it failed to give appellant credit for payments made to or received by appellee.

The cross-petition asserted four causes of action:

The first was based on payments made by appellant to suppliers of materials to appellee incident to the construction contemplated by the subcontractor. The suppliers filed liens against the Imperial and Atwood grain facilities and appellant was compelled to pay and discharge them in the sum of $14,303.46 for which it sought judgment against appellee.

The second asserted that appellee contractually warranted its work and material; that it knowingly, in violation of its obligation, installed defective concrete and failed to tighten bolts and braces; and that the damage to appellant because of the former was $15,000 and the damage resulting to appellant because of the latter was $5,000, for the total of which it prayed judgment.

The third claimed that appellee and Jack E. Mack conspired to defraud appellant and as a consequence thereof it was damaged by misapplication by Jack E. Mack in the sum of $22,854.90 which appellant seeks to recover.

The fourth alleged that by overpayment made by appellant to appellee, accomplished by conspiracy and fraud of Jack E. Mack and appellee, it suffered damage in the sum of $16,962.50 for which judgment was asked against appellee.

The cause of action of appellee and the first cause of action of appellant were disposed of by stipulation of the parties and judgments in accordance with the stipulation. They are not involved in this appeal. The district court, after trial of the issues concerning the second,

third, and fourth causes of action, found generally for appellee and against appellant and that the proof failed to establish fraud or conspiracy by or between Jack E. Mack and appellee in any respect as charged by appellant or a proper measure of damages for any of the acts or wrongs alleged to have been committed by appellee. The trial court rendered a judgment dismissing the second, third, and fourth causes of action and denied the motion of appellant for a new trial. The appeal is from the denial of the motion for a new trial.

The numerous persons who participated in the circumstances of this litigation and who were witnesses for appellant may appropriately be identified as a contribution to economy of space and prevention of the necessity of repetition of their given names:

John Ellis, an investment broker associated with Eastman, Dillon & Co., a member of the New York Stock Exchange, and Robert Brady, an employee of that firm, met Jack E. Mack, hereafter referred to as Mack, the former in February and the latter in February or March of 1951. They assisted Mack in procuring financing for the grain storage venture and they presented the proposal of Mack for the venture to Henry Sears & Co. and Payson & Trask.

Henry Sears, a partner, and Stellan C. Wollmar, an associate, of Henry Sears & Co., a private investment company of New York City, each participated in the preliminary negotiations with Mack.

Charles E. Saltzman, a partner of Henry Sears & Co., was a director of appellant when the agreement with Mack was executed.

Frederick K. Trask, Jr., was a partner in Payson & Trask, New York City, a firm employing its own capital in the equity financing field. He participated in the preliminary negotiations with Mack.

James E. McMullen, a partner in Payson & Trask and secretary-treasurer of appellant, had part in the preliminary negotiations with Mack and represented his

firm, Henry Sears & Co., and appellant in their dealings with Mack after the agreement was made. He is a public accountant and has held important assignments with large industrial concerns.

Robert Hellendale and Edgar C. Morrison are each associated with the law firm of Carter, Ledyard & Milburn of New York City and they each participated in the preliminary negotiations, and the drafting of the agreement of appellant with Mack and the stock option agreement.

John D'Antonio, a graduate and practicing engineer, was employed by appellant as its technical representative during the construction of the Imperial and Atwood facilities to perform the duties of engineer specified in the agreement with Mack.

Arven D. Reynolds was employed by Mack from September 1949 to February 1952 as office manager.

Jack E. Mack was president and director of appellant, the contractor for the construction of the facilities, and he was sole owner of Western Construction Co.

The individuals named in the foregoing identification will each henceforth be referred to herein by his surname.

Robert Stillinger was a partner of appellee. He will be identified herein by his surname.

Mack was engaged in the construction of grain storage facilities. The Commodity Credit Corporation needed storage capacity of which there was a shortage and in order to interest persons in construction thereof offered to guarantee rentals therefor during a designated period of time. Mack had occupancy agreements for ten sites in Kansas and Nebraska and desired to build facilities thereon for himself but he had to secure large financial assistance to realize his desires in this respect. He went to New York City in the early part of 1951 seeking financial aid. He talked to Ellis and his associate Brady concerning his proposals and desires. They were engaged to assist Mack in procuring the financing he desired and for their services, if successful, they were to

have 5 percent of the equity stock in the company which would be organized.

The proof is that the words "equity stock" generally refer to the common stock of a corporation which is completely at the risk of the business and which obtains its reward only through the earnings of the business the corporation conducts; and that the term "senior financing" refers to forms of financing senior to the common stock and includes both preferred stock and loans made to the company. Ellis and Brady told Mack that equity investors would exact between 40 and 60 percent of the equity stock and probably some evidence of seniority for the money they contributed. Mack proposed to erect the facilities at cost without money profit but would get his compensation in the form of common stock. He would thus avoid high taxes on ordinary income and attain a position to realize a long-term capital gain.

Ellis prepared a memorandum designated "A Grain Storage Proposal." It stated Mack would take his profit in the form of common stock in the new corporation. It was examined and approved by Mack and was sent to several venture capital groups including Henry Sears & Co. and Payson & Trask. There were negotiations with the two firms last named beginning in May 1951. They were interested in contributing equity money but a firm commitment of senior financing had not been secured. The Equitable Life Assurance Society of New York City seemed to be a probable contributor of senior money. It was explained to it that the advantage of the proposal of Mack resulted from the fact that he was to do the construction work at cost and that the facilities would be completed at a very low competitive cost. A conference was held on June 6, 1951, attended by representatives of The Equitable Life Assurance Society, Henry Sears & Co., Payson & Trask, Ellis, Brady, Mack, and his counsel. The Equitable Life Assurance Society had approved a 2-million-dollar mortgage loan but there

was an unsolved problem. The Federal Reserve Board had in March 1951 adopted a regulation which limited the amount of a mortgage loan to 50 percent of the cost of the security. It was not known whether the Federal Reserve Board would construe the cost of security in this instance as the cost for which Mack offered to build the storage or the cost as it would be if normal profit in cash was taken by the contractor. It did not develop that this could be ascertained in advance. The Equitable Life Assurance Society shortly thereafter withdrew and the ten-site storage proposal was not realized.

The preliminary negotiations incident to the execution of an integrated agreement of uncertain meaning are admissible for the purpose of ascertaining the intentions of the parties, the conditions present when the writing was made, and the purposes intended to be accomplished. The contract between appellant and Mack does not expressly state that he was to build the facilities at cost but it consists of two writings, a construction contract and a stock option agreement, which must be interpreted together. The preliminary negotiations establish beyond doubt that the agreement was that Mack was to build the storage structures at cost and that appellant in consideration therefor was to issue to Mack up to 40 percent of its equity stock at a nominal cost without obligation on his part to contribute to senior money. This court has recognized and applied the doctrine of admissibility of preliminary negotiations subject to the limitation that plain terms of the writing resulting therefrom may not be varied. There is no variation of plain terms involved in this case. Nebraska Hardware Co. v. Humphrey Hardware Co., 81 Neb. 693, 116 N. W. 659; Wilderman v. Watters, 149 Neb. 102, 30 N. W. 2d 301; Sofio v. Glissmann, 156 Neb. 610, 57 N. W. 2d 176; Restatement, Contracts, § 242, p. 341.

A short time before August 24, 1951, Mack informed Ellis and Brady that he had a more limited proposal to make. The sole difference between his first proposal

and his second one was size. A construction-at-cost plan was inherent in and common to both. Substituted for ten facilities with a storage capacity of about 7 million bushels in the first were two in the second with about 2 million bushels of storage capacity. The second proposal contemplated a cost of about $400,000. Mack was asked to put the proposal in writing. Ellis and Brady interviewed Wollmar who said he was interested in exploring the new development. Mack went to New York later and had with him documentation to support his cost estimates. He had a telegraphic bid of appellee as a proposed subcontractor of much of the work which was used by Mack to obtain the execution of the prime contract. The circumstances point quite clearly to the participation of appellee very early in the fraudulent acts and pattern established by evidence of later additional facts.

The agreement between appellant and Mack was made and executed November 9, 1951. It consists of two instruments, the prime construction contract and a stock option agreement. These must be considered and interpreted as one. They were made at the same time, concerned the same subject matter and undertaking, and one was signed as a condition of the signing of the other. Nebraska Hardware Co. v. Humphrey Hardware Co., *supra;* Campbell v. Ohio National Life Ins. Co., 161 Neb. 653, 74 N. W. 2d 546. Appellant was organized to accomplish the business purposes of the parties. Mack was elected a director and president of the newly formed corporation. From the inception of the life of appellant he occupied a fiduciary relationship to it and he must be treated as a trustee. Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393; Beaumont v. Folsom, 136 Neb. 235, 285 N. W. 547; Duffy v. Omaha Merchants Express & Transfer Co., 127 Neb. 273, 255 N. W. 1; Pepper v. Litton, 308 U. S. 295, 60 S. Ct. 238, 84 L. Ed. 281. Mack, as a fiduciary, was prohibited from business relationships with the corporation of which he was a director and

chief officer without complete and truthful disclosure. Any nondisclosure by him was, in the circumstances of this case, a material misrepresentation and fraud. Rettinger v. Pierpont, *supra*. He was, as a fiduciary, obligated to conduct himself by the strict standards of rectitude that bind a trustee. Meinhard v. Salmon, 249 N. Y. 458, 164 N. E. 545, 62 A. L. R. 1. The representations of Mack that he would construct the storage structures at cost, that his obligations to appellee were a definite amount, and his subsequent clandestine profits and dealings with appellee constituted fraud as a matter of law. Keystone Surgical Supply Mfg. Co. v. Bate, 187 Pa. 460, 41 A. 299.

Appellant opened an account with The First State Bank of Scottsbluff December 7, 1951, and deposited $109,956. The deposit was to be used by Mack to pay obligations incurred by him in the construction of the grain storage facilities and this and other amounts that were later deposited in the account of appellant were placed therein upon the representation that Mack had incurred obligations on that account. Mack testified that to obtain additional funds he would certify to D'Antonio the expenditures he had incurred and based thereon D'Antonio would make a certificate, present it to the appellant, and it would then make funds available for the use of Mack by placing deposits in its bank account. Mack had authority to withdraw funds to pay the cost of construction of the facilities. On December 7, 1951, Mack had 2 cents in his bank account which appeared in the records of the bank as Western Construction Company, trade name for Mack. On that date he transferred $50,000 from the bank account of appellant to his own bank account. His account was on that date debited with the sum of $26,682.49. This entire amount, except the opening balance of 2 cents and a payment of $500 to Fairbanks Morse, was converted and misapplied by Mack. The payment of two personal loans in the sum of $25,000 was included in the amount debited to

his account that date. The result was that Mack misapplied $26,182.49 the day the account of appellant was opened.

The account of Mack was debited with a $28,462.50 payment to appellee December 12, 1951. Mack transferred another $50,000 December 10, 1951, to his account from the account of appellant. The deposits in the account of Mack from sources other than appellant were $1,164. It is certain that the $28,462.50 payment to appellee came from the funds of appellant and not from funds of Mack. Appellee has not accounted for the payment to it of the $28,462.50.

Mack sent D'Antonio a letter, dated February 5, 1952, to which were attached statements of his accounts with appellee and various suppliers. He stated therein that these accounts were "accurately established from records." He represented thereby that he had paid appellee, the subcontractor, on December 4, 1952 (1951), $34,426.25 and on January 15, 1952, $17,891.15, a total of $52,317.40. Mack, when he was asked the purpose of sending this letter to D'Antonio, stated it was to receive funds. The construction contract made it the duty of Mack to furnish D'Antonio all vouchers, invoices, and receipts required by him to perform his duties as engineer for appellant. The contract made it the duty of D'Antonio to determine the amounts expended or obligations incurred by Mack and to certify to appellant the findings he made in the exercise of his duties. Mack was bound to furnish complete and truthful information to D'Antonio and he was strictly obligated to make certificates based thereon. Each of them knew the obligation of the other because the contract clearly expressed it and conversations with Mack had discussed it. Mack knew that the account of appellee enclosed with the letter of February 5, 1952, was false. The letter was dictated by Mack and written by Reynolds, the office manager of Mack. He testified he knew the representation made by the letter concerning the account of ap-

pellee was false and that the amount paid appellee to that time was only about $28,000; and that Mack told Reynolds at the time the letter was written that the purpose of inflating the accounts was to enable Western Construction Company to make a profit on the Central States construction job. Mack had previously told Reynolds that he was putting up the facilities at cost for the figure he had submitted in New York.

D'Antonio would not make and execute a certificate on the statement of Mack of his payments to appellee. He refused to do so until written evidence from appellee was secured and submitted. Mack was advised after receipt of his letter of February 5, 1952, that it did not satisfy the requirements of the contract and no further advances could be made by appellant until a receipt from appellee was furnished. On the date of the letter Mack had paid appellee $29,462.50. The letter represented that he had paid appellee $52,317.40 as of that time. Concealment of a discrepancy of $22,854.90 was a pressing problem. The plan adopted by Mack was to knowingly and fraudulently misrepresent the facts. Reynolds testified that he heard Mack request suppliers and subcontractors to furnish him receipts showing they had been paid more money than they had actually received. Appellee was one to whom the request was made. It complied and furnished Mack with a confirmatory statement addressed to appellant in which payment of $52,317.40 is shown to have been made by Mack to appellee. The significance and importance of this writing justifies setting it out, with omission of the letterhead:

"Central States Grain Co. 12 Feb., 1952
Scottsbluff, Neb.

Att'n Mr J. H. Mack, President

Gentlemen:

Anent our contract for construction of grain storage units at Atwood and Imperial, our records show the following current position:

Total Contract $137,705.00

1st Payment	$34,426.25	
2nd "	17,891.15	52,317.40
Balance Due		$ 85,387.60

Yours truly
STILLINGER-NAPIER
T. D. Napier"

Mack wrote a letter to D'Antonio dated February 13, 1952, in which he said he had talked with Tom Napier that morning by telephone and he was sending his statement which would be forwarded as soon as it was received by Mack. He said: "I think that this will once and for all clarify the issue of money disbursements. * * * Without a doubt Jim (McMullen) was absolutely right in his insistence for this documented data * * *."

When Mack had paid appellee but $29,462.50 but represented he had paid $52,317.40 and thereafter secured from appellee a written formal statement directed to appellant that Mack had paid appellee the larger amount, consisting of two items, it should be considered as established that appellee and Mack acted in fraudulent concert to defraud appellant. It may not be considered a mere coincidence that such a fraudulent figure could have been severally adopted. Such a situation convincingly speaks of a willful design and a mutual understanding of conspirators.

A conspiracy is defined in Rettinger v. Pierpont, *supra*, in this manner: "A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means. * * * The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury."

In Trebelhorn v. Bartlett, 154 Neb. 113, 47 N. W. 2d 374, the court said: "A conspiracy, like other facts,

may be proved by direct or circumstantial evidence, and one means of proof is by showing overt acts or representations of the individuals charged with conspiracy. From the fact that different persons at different times by their acts or representations pursued the same object, the jury may, in connection with other facts, infer the existence of a conspiracy to effect that object. * * * In an action for damages based upon a conspiracy to defraud by wrongful acts or false representations, the damages and not the unlawful confederation is the gist of the action, so that if damages are shown to have resulted to plaintiff from such acts or representations of defendants or any of them, then a judgment against such defendants may be sustained without establishing a conspiracy among them all."

The court said in Marsh-Burke Co. v. Yost, 98 Neb. 523, 153 N. W. 573: "A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must be, proved by a number of indefinite acts, conditions and circumstances, which vary according to the purpose to be accomplished. If it be proved that defendants, by their acts, pursued the same object, although by different means, one performing one part and another another part, with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object."

Mack, by his manner of testifying, confirmed the conclusion that he had acted deceitfully. When he was asked if he had paid appellee before February 5, 1952, the sum of $52,317.40, he answered: "That I don't know either." He was then asked if that sum was accurately established from his records as disbursements to Stillinger & Napier. His answer was not a model of forthrightness or clarity. Here it is: "I don't know out of that designated payment right there what our profit motive was at that time."

The subcontract with appellee required a total pay-

ment for the construction provided by its terms of $137,705. While Mack was testifying concerning the claimed payment of $52,317.40 to appellee he said he certainly had a profit motive. He was asked to tell how he would accomplish the making of a profit on the subcontract with appellee and he said one way of doing it would be for him to pay appellee less than the total contract price for the work appellee was to accomplish and another way of doing it would be "by refund." He was then pressed for an explanation of how he was going to make a profit out of that subcontract and he then stated: "Well, in the form of refund, which would be the logical way to handle the contract." It seems certain that Mack was determined to get money from appellant by some dishonest method and appellee showed effective willingness to cooperate with him to that end. Mack finally testified that the claim made by him that he had paid appelleee in two payments a total of $52,317.40 before his letter of February 5, 1952, was false. Stillinger also denied payment to appellee of this amount. However, because of the signed statement of appellee of February 12, 1952, which was procured and furnished by Mack to D'Antonio, he executed a certificate relying thereon and Mack was given credit for $52,317.40. Thereby Mack, by the cooperation and misrepresentation of appellee, misapplied and converted the difference between that amount and $29,462.50 which Mack had in fact paid appellee, or the sum of $22,854.90, and appellant sustained damage in that amount. That is the amount of the third cause of action. The recovery appellant seeks in that regard is for the conversion of its own funds by an unfaithful fiduciary who was bound to conduct himself in regard to appellant in the most impeccable manner. He was assisted by appellee and they both participated and cooperated to produce that result. A conspirator is liable for the consequences of a conspiracy without regard to whether or not he is rewarded by benefit from it.

The doctrine is well stated in Warsop v. Cole, 292 Mich. 628, 291 N. W. 33: "There is no question but that the conspiracy between the parties having been once established, whatever was done in pursuance of it by one of the conspirators is to be considered as the act of all, and all are liable irrespective of the fact they did not actively participate therein or the extent to which they benefited thereby. It is sufficient if the proof shows such a concert of action in the commission of the unlawful act or such other facts and circumstances from which the natural inference arises that the unlawful overt act was in furtherance of a common design, intention and purpose of the alleged conspirators to commit the same." See, also, Hutson v. Imperial Royalties Co., 135 Kan. 718, 13 P. 2d 298; Anderson v. Thacher, 76 Cal. App. 2d 50, 172 P. 2d 533. The conclusion is that appellee is liable to appellant for $22,854.90 which Mack misapplied. However, as is developed by later discussion of the case, it was the intention of Mack and appellee to participate jointly and dishonestly in $52,317.40 of the funds of appellant.

Mack was required by the construction contract to furnish D'Antonio with vouchers, invoices, and receipts showing the expenditures and incurred obligations and the engineer was required by that instrument to certify his findings to appellant. It was implicit in these provisions that truthful evidences of expenditures and incurred obligations were contemplated and required.

Appellee, after it commenced construction work as the construction contract intended, submitted progress estimates to Mack for the purpose of obtaining payment for work done by appellee. In his letter of February 5, 1952, Mack referred to the fact that he then had before him a copy of progress estimate No. 1 for concrete and that the amount of it was $11,000. It was dated February 2, 1952. This figure represented all the work which appellee had done on the storage facilities at Imperial and Atwood. No credit was given

for the actual down payment made by Mack to appellee of $29,462.50 or for the purported payment of $52,317.40. The progress estimate No. 1 was paid by Mack in two payments of $5,000 on February 9, 1952, and $6,000 on February 16, 1952. D'Antonio certified these expenditures February 25, 1952.

Thereafter on February 18, 1952, progress estimates Nos. 2 and 3 were submitted in the amount of $10,000 and $5,000, respectively, and they were paid by Mack on March 1 and March 14, 1952.

The progress report No. 4, dated March 3, 1952, detailed the work done at a cost of $34,250, recited the payments made in the amount of the progress estimates Nos. 1, 2, and 3 in the total sum of $26,000, and showed a balance due of $8,250. Mack paid this to appellee.

The progress estimate No. 5, dated March 17, 1952, detailed the payments made on the four previous estimates and claimed a balance due of $5,300 which was paid to appellee by check of appellant signed by McMullen, the treasurer of the corporation.

The progress estimate No. 6, dated April 1, 1952, detailed all work done on the storage facilities at Atwood and Imperial and stated the value thereof as $51,325. It listed each of the five payments made in the respective amounts of the five previous progress estimates constituting total payments of $39,550 and stated a balance of $11,775. This was paid to appellee April 18, 1952, by check of appellant signed by McMullen. The check was endorsed by appellee and it was paid. There was on the back of the check above the signature of appellee the following: "Payee acknowledges full payment of all indebtedness for services, labor and supplies to April 1, 1952, performed or furnished for grain storage facilities at Imperial, Nebraska, and Atwood, Kansas."

Appellee gave what is called estimate No. 7, bearing date of April 18, 1952, to D'Antonio on the morning of April 19, 1952. It included all work done to the latter

date. It set forth in detail the work done by appellee and the cost thereof as $63,825. The deductions therefrom were stated as "Less estimates 1 through 6" $51,325 and it claimed as unpaid for work done from April 1, 1952, through April 18, 1952, $12,500. However, it was stipulated at the trial that the value of the work done by appellee on construction of the storage facilities from April 1, 1952, through April 18, 1952, was the sum of $14,825 and judgment therefor was rendered in this cause in favor of appellee.

The value of the work done by appellee to April 1, 1952, as shown by progress estimate No. 7 prepared by appellee and by other evidence, was $51,325 and appellee was fully compensated therefor by payment to it of the amounts claimed to be due by the first six progress estimates. There should be added thereto the value of the work done after April 1, 1952, which was, as stipulated and adjudicated, the sum of $14,825. Hence the total value of the work done by appellee by virtue of its subcontract was the sum of $66,150. Appellee received $29,462.50 and $51,325, or a total of $80,787.50. Appellee was overpaid in this respect $14,637.50. This is the subject matter of the fourth cause of action.

There is no material dispute in the proof. The facts are convincing that Mack and appellee conspired together to defraud appellant of $52,317.40. It seems beyond doubt that they acted in concert to this end for the gain of each. Mack had the benefit of $22,854.90 by virtue of the admittedly dishonest statement of February 12, 1952, made by appellee. That was an overt act of appellee in accordance with the design of the parties to the conspiracy. Mack showed his appreciation by refraining from requiring appellee to account for the down payment and it intended thereby to obtain an overpayment of $29,462.50. The fact that appellee did not intend to give terminal credit for the down payment is established beyond the area of argument or dispute. If this was not true, why did appellee file a lien against

the storage facilities when the amount it was secreting exceeded the amount of the asserted lien.

There is no conflict in the evidence that appellee installed defective concrete in the storage facilities of such character and under such conditions that it was unsuitable for the purpose intended and required; that it was necessary to remove and replace it with proper and suitable concrete; and that the fair and reasonable cost thereof was the sum of $4,009.81 which appellant paid and because thereof it was damaged in that amount. There were many bolts used in the construction of the facilities for fastening braces, putting on aluminum siding, and for other purposes. Appellee inserted the bolts but did not tighten the burrs on them. They were required to be made what is spoken of in the record as "wrench tight." This required going over the entire structures. It was a very considerable undertaking. There were twelve to fifteen men employed to accomplish the necessary result. The fair and reasonable cost was $4,205.46 which was paid by appellant and it was thereby damaged in that amount.

If a construction contract is substantially performed, as was the situation in this case, the damage which the owner suffers because of defective workmanship is measured by the fair and reasonable cost of remedying the defects. Cartwright & Wilson Construction Co. v. Smith, 155 Neb. 431, 52 N. W. 2d 274.

Appellant should have judgment against appellee as follows: On the second cause of action for the sum of $8,215.27 with interest thereon at 6 percent per annum from the date it is rendered; on the third cause of action for the sum of $22,854.90 with interest thereon at 6 percent per annum from February 12, 1952; and on the fourth cause of action for the sum of $14,637.50 with interest thereon at 6 percent per annum from the date the judgment is rendered.

The judgment of the district court as to the second, third, and fourth causes of action of appellant should be

and it is reversed and the cause is remanded with directions to the district court for Chase County to render a judgment herein in favor of appellant and against appellee in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. ADOLPH HOHENSEE, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. DONALD SMITH, APPELLANT.

82 N. W. 2d 554

Filed April 26, 1957. Nos. 34086 and 34087.

1. **Municipal Corporations: Evidence.** A municipal court will take judicial notice of the ordinances of the city, and on appeal to the district court from a conviction under a city ordinance the latter court will on a trial de novo take notice of whatever facts the municipal court was required to notice judicially.
2. **Municipal Corporations: Appeal and Error.** On an appeal to the Supreme Court from a judgment of the district court convicting a defendant of a violation of a city ordinance, the same being a review of the proceedings and not a trial de novo, the existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record.
3. ———: ———. The judgment of the district court in such a case will on appeal to this court be accorded the usual presumption of regularity, and it will be presumed, nothing appearing to the contrary, that facts before that court established that the facts set out in the complaint constituted a violation of the ordinance of the city.
4. **Municipal Corporations: Penalties.** A prosecution for the violation of a city ordinance, which does not embrace any offense made criminal by the laws of the state, while in form a criminal proceeding, is, in fact, a civil one to recover a penalty, and a preponderance of the evidence is all that is required to sustain a conviction.
5. **Appeal and Error.** The verdict of a jury based upon conflicting evidence will not be disturbed on appeal unless it is clearly wrong.

APPEAL from the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Louis T. Carnazzo and *C. H. Morris,* for appellants.

Edward F. Fogarty, Bernard E. Vinardi, Neal H. Hilmes, Irving B. Epstein, and *Charles A. Fryzek,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

The defendants were charged in separate complaints with a violation of a city ordinance of the city of Omaha which prohibited the solicitation or collection of money or contributions without first filing a written statement with the superintendent of the board of public welfare stating the purposes for which money or contributions are to be solicited or collected. The jury returned a verdict of guilty on each complaint. The trial court imposed a fine of $200 on the defendant Hohensee and of $100 on the defendant Smith. Each defendant has filed a separate appeal.

These two cases were tried together in the district court by agreement of the parties. They were also consolidated on appeal by stipulation of the parties.

The State called as witnesses two members of the police department and a deputy license inspector. Two were present on June 27 and all were present at the Rome Hotel in Omaha on June 28, 1955, when the defendant Hohensee delivered lectures on nutritional science. Their evidence shows that during the course of these lectures the defendant Hohensee with the assistance of the defendant Smith caused small envelopes to be passed out to those in attendance with the explanation that all persons who placed one dollar or more in the envelope would receive a subscription to Life Span, a magazine written and prepared by Hohensee. The evidence of these witnesses further shows that Hohensee stated that any amounts less than one dollar placed in the envelopes would be used to further the

cause but would not entitle the donor to the magazine. The evidence shows further that a written statement was not filed with the board of public welfare, a fact not disputed by the defendants.

The evidence of the defendants is that the money collected was solely for subscriptions to the Life Span magazine and that no funds were solicited or received for any other purpose. The defendants deny that any statement was made regarding any amount less than one dollar.

The evidence clearly raises an issue of fact for determination by a jury. Since it was sufficient to sustain the verdict at which the jury arrived, the assignment of error that the evidence was insufficient to sustain the verdict is without merit.

It is contended by the defendants that the complaints filed against them do not state an offense in that they do not negative an exception contained in the ordinance under which the complaints were drawn. The ordinance was not offered in evidence and it does not otherwise appear in the record. The action, though criminal in form, is a civil one for the collection of a penalty. For this court to consider the sufficiency of a complaint filed pursuant to a city ordinance, the ordinance must be admitted by the pleadings or offered in evidence. This court does not take judicial notice of municipal ordinances and a failure to properly present an ordinance when the sufficiency of the complaint is questioned precludes our consideration of the sufficiency of the complaint. Steiner v. State, 78 Neb. 147, 110 N. W. 723; Maxwell v. Steen, 93 Neb. 29, 139 N. W. 683; State v. Novak, 153 Neb. 596, 45 N. W. 2d 625. Under the foregoing holdings the district court for Douglas County could properly take judicial notice of the applicable ordinance in a trial of the case de novo. This court, in reviewing the case on appeal, when the ordinance is not properly before us, will not presume error on the part of the district court. It must be shown from the record.

In such a situation the presumption of regularity must prevail. Wells v. State, 152 Neb. 668, 42 N. W. 2d 363; State v. Novak, *supra*. It is the rule also that a complaint based on the violation of a city ordinance will be deemed sufficient on appeal, except in case of a complete failure to state a cause of action. State v. Neimer, 147 Neb. 284, 23 N. W. 2d 81. The facts stated in the complaint are presumed to charge an offense under the ordinance when the ordinance is not properly presented in the record. We fail to find any reason to say that there was a complete failure to state a cause of action. We conclude that the sufficiency of the complaint is not subject to attack.

A prosecution for the violation of a city ordinance, which does not embrace any offense made criminal by the laws of the state, while in form a criminal proceeding, is, in fact, a civil proceeding to recover a penalty, and a preponderance of the evidence is all that is required to sustain a conviction. State v. Neimer, *supra*. The evidence, though conflicting, is sufficient to sustain the verdict of the jury. As to the defendant Smith, the evidence shows that he was a paid assistant of the defendant Hohensee. The jury could properly find that he aided and abetted the defendant Hohensee, and consequently be held to have violated the ordinance as charged. An affirmance of each conviction is therefore required.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. COUNTY OF KIMBALL ET AL., APPELLEES.
82 N. W. 2d 479

Filed April 26, 1957. No. 34093.

1. **Process.** Where the return of an officer recites that he served the summons on which the return is endorsed, the presumption is that he performed his duty in making the service.

2. ———. The rule is well established in this state that an officer's return on a summons is prima facie proof of the service therein indicated.
3. **Judgments.** When a judgment is attacked collaterally, or when a long time after the judgment is entered the correctness of an officer's return is assailed, great faith and credit must be given to the formal return of the officer.
4. **Process.** The return of an officer cannot be impeached except by clear and convincing evidence.

APPEAL from the district court for Kimball County: ISAAC J. NISLEY, JUDGE. *Reversed and remanded with directions.*

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for appellant.

Heaton & Heaton, for appellees Scott.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

The State of Nebraska filed an application on May 5, 1955, in the district court for Kimball County, the purpose of which was to acquire possession of Section 16, Township 16 North, Range 55 West of the 6th P.M., in Kimball County as that section is established by a survey made in accordance with the order of the district court for Kimball County entered in 1933. The resurvey revealed that a portion of land previously thought to lie in the north half section of Section 21 was actually a part of Section 16.

The defendants, Robert E. Scott and Anna R. Scott, by their answer filed in the present action in opposition to the State's application, insofar as pertinent to this appeal, alleged that the order of the court entered on December 7, 1933, was null and void for the reason that the service of process alleged to have been made upon these defendants in the city and county of Denver, Colorado, on the 12th day of June 1933, was in truth and fact never made; that the return of the deputy sheriff on said

service of summons was false; that these defendants were never notified of the pendency of said action filed in 1933 in Kimball County; and that the plaintiff, State, was not entitled to relief prayed for in its application. Defendants prayed that the State's application be dismissed.

The State filed a general denial in reply to the defendants' answer.

On May 2, 1956, trial was had to the court on the State's application, and evidence was presented by the parties. After the trial had concluded, the trial court found and decreed that there had not been due and proper service of process upon the necessary parties defendant at the time of the original hearing in 1933; that the order entered by the court at that time was null and void; and that the present application of the plaintiff should be dismissed. The court did dismiss the State's application.

The State filed a motion for new trial. The trial court overruled the motion for new trial, and from the order overruling the motion for new trial, the State appeals.

On June 7, 1933, the State filed its petition in the district court for Kimball County against certain named defendants. In its petition the State alleged that it was the owner in fee simple of Section 16, Township 16 North, Range 55 West of the 6th P.M., in Kimball County; and that the correct corners and boundary lines of said land had been in dispute for a number of years and the plaintiff desired to have them established and made certain. The State further alleged that the correct corners and boundaries were as established by a survey made in 1928 by H. B. Lawson, deputy state surveyor, pursuant to statutory procedure. The petition further alleged that R. Elmer Scott was the record owner of, and Anna R. Scott his wife was interested in, the northeast quarter of Section 21 in said township and range which adjoined Section 16 on the south.

While the petition sets forth interests of other persons

in connection with the subject matter involved in this action, any interest said persons so named in the petition may have had is not for determination in this appeal. We are concerned in this appeal only with the service had upon the defendants Scott.

The prayer of the petition was that the corners and boundaries of Section 16, Township 16 North, Range 55 West of the 6th P.M., in Kimball County be established by the court.

On June 7, 1933, affidavit was filed for service of summons out of state, showing R. Elmer Scott and his wife to be residents of Colorado and that summons could not be served upon them in the State of Nebraska.

We make reference to exhibit No. 1 which is as follows:

"Summons - Outside of State - District Court - Original

STATE OF NEBRASKA,) The State of Nebraska
) ss. Kimball County.
Kimball County) TO THE SHERIFF OF
County SAID COUNTY, GREETING:

You are hereby commanded to notify R. Elmer Scott and Anna R. Scott, his wife Defendants that they have been sued by The State of Nebraska Plaintiff, in the District Court of the 13th Judicial District in and for the County of Kimball and that unless they answer on or before the 10th day of July A. D., 1933, the petition of said Plaintiff filed against them in the Clerk's Office of said Court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on or before Monday, the 19th day of June, A. D., 1933.

SEAL WITNESS MY HAND and seal of said Court at Kimball Nebraska, this 7th day of June A. D., 1933."

This summons was signed by the clerk of the district court.

"STATE OF NEBRASKA,)
) ss.
Kimball County) I, C. A. Forsling sheriff
County
in and for said County, and State of Nebraska, do hereby appoint the Sheriff or any Deputy Sheriff of Denver County, State of Colorado, to serve this writ." Signed by C. A. Forsling.

We make reference to the return on the reverse side of the summons which reads as follows:
"STATE OF Colorado,)
) ss.
Denver County) R. I. Shores being first duly
County
sworn, deposes and says that he is the identical person who was appointed by the sheriff of Kimball County, State of Nebraska, to serve the within summons, that he served the within summons on the within named R. Elmer Scott and Anna R. Scott, his wife, on the 12th day of June, 1933, by handing to and leaving with each of them in Denver County, State of Colorado, a true and certified copy thereof with all the endorsements thereon." Signed by R. I. Shores and subscribed and sworn to in the presence of a notary public on the 12th day of June, 1933. The fees for the service appear as follows: Service and return $2; mileage $1.05; and notary fees 50 cents.

On December 7, 1933, the trial court found that the plaintiff, the State, was the owner of all of Section 16, Township 16 North, Range 55 West of the 6th P.M., in Kimball County; and that the defendants owned the property adjoining thereto as alleged in the plaintiff's petition. The court further found that the corners recognized by Lawson as original government corners in the northeast corner, the southeast corner, and the southwest corner of Section 16 were not original government corners. The court further found that there were no government corners on Section 16, that the corners and boundary lines of Section 16 were those found by assum-

ing the northwest corner of Section 16 as located in said dependent resurvey to be an established corner and by assuming the original government corners as above mentioned to be the only original government corners within said township and establishing the corners and boundaries of said Section 16 under such assumed state of facts according to the rules of government surveys in effect on that date. The court adjudged and decreed that the boundary line of Section 16 be fixed and adjudicated according to its findings; and that if the plaintiff should locate upon the ground the boundary lines as adjudicated, it might, upon such notice to the defendants, or any of them, as the court might direct, be placed in possession of any part of Section 16 as defined, which was occupied by the defendants.

The result of the resurvey of 1954 was to locate Section 16 so that the boundary lines included approximately 40 acres of land that under the 1928 survey had been a part of Scotts' quarter section. As between the 1928 and 1954 surveys, the Scotts would be deprived of approximately 40 acres of the area of their quarter section of land.

The record discloses that it was stipulated by the parties that the survey made by Hugh Dillon, the State Surveyor, filed and made a part of the State's application in this case, was in direct accord with the findings of the district court for Kimball County and the judgment entered therein December 7, 1933.

It was stipulated that exhibit No. 1, which purports to be the original summons, outside of state, issued for service upon R. Elmer Scott and Anna R. Scott, his wife, in this action under date of June 7, 1933, and the return to such summons on the reverse side of exhibit No. 1 may be admitted and considered without objection in the action.

It was further stipulated that it was the contention of the plaintiff that the defendant Scott was in possession of 39½ acres of land claimed by the plaintiff as being a

part of Section 16; that this action was for the purpose of obtaining possession thereof; and that the defendants denied that the State was the owner of the said 39½ acres, or that said acreage belonged to Section 16.

At this point the State rested its case.

Paul Wilger testified for the defendants that he had lived in Kimball County since 1919, and was familiar with the north half of Section 21, Township 16 North, Range 55, Kimball County. He farmed the north half of Section 21 for Robert Scott whose land was the northeast quarter of Section 21, and farmed John Kelly's quarter section of land located in the northwest part of Section 21, at the same time he was farming a quarter section of land of his own. He further testified that Section 21 is just south of Section 16. He farmed this land from 1919 until 1937. In 1928, this witness personally submitted a petition to cause an election to have the township surveyed. The election was held, and as a result Lawson, a deputy state surveyor, made a survey. This survey located the boundary line and made no change in the boundary line which he had known since 1919.

Anna R. Scott, the wife of R. Elmer Scott and one of the defendants, testified that she had lived in Denver since 1921, and had never lived in Kimball County; that she was married to Mr. Scott in 1926; and that in 1933 she was employed by Doctors Hillkowitz and Freshman, and was also employed as registrar of the National Board of the Registry of Medical Technologists. She further testified that in June 1933, she and Mr. Scott were living in an apartment house located at 1801 Grant Street in Denver, and that she did not receive the summons, exhibit No. 1, at 1:40 p.m., June 12, 1933, which was on a Monday. She further testified that Mr. Scott was an auditor and worked at a different place than she did; that they prepared their breakfast in the apartment, did not go home for lunch, and generally had their evening meal together down town in Denver; and that she and her husband could not have been at the apartment at

1:40 on Monday, June 12, 1933. She testified further that she first heard about this case when the present tenant on their land in Kimball County came to Denver and called her husband, and her husband in turn called her. This was in 1955. She further testified that she worked in the doctors' office from 8:30 a.m. until 5 p.m., and many times after that hour did her other work. She could not account for the particular day of June 12, 1933, but testified that in all probability she and her husband ate dinner down town, the same as any other day. After finishing the evening meal, Mr. Scott would go back to his work and she would return to her work. In 1933, Mr. Scott was working independently as an auditor. She further testified that no deputy sheriff ever handed her a summons notifying her of an action pending in Kimball County; and that she was positive about this fact.

Robert E. Scott testified that he went to Denver in the latter part of 1922, and had resided there since that time; that he had been referred to as R. Elmer Scott; that he and Mrs. Scott own the quarter section of land here involved, that is, the northeast quarter of Section 21, which he acquired in 1918 or 1919; that in 1933, he was doing accounting work for various companies and had several accounts; and that at that time he lived at 1801 Grant Street in Denver. He testified as to the positions his wife held. In June 1933, he was carrying a heavy schedule, working on a supplemental audit for an insurance company in the Central Savings Bank Building. He and Mrs. Scott would leave their apartment around 8:30 a.m. They would only cook their breakfast in the apartment. He could not recall the details of what happened on any specific day as far back as June 1933, but it would be very improbable that he and Mrs. Scott would be at the apartment at 1801 Grant Street in Denver at 1:30 or 1:40 p.m., June 12, 1933. He further testified that no sheriff of Denver County handed him personally a summons with reference to an action pending in Kim-

ball County; and that he never received a summons of any kind. In 1955, he was called by a representative of an oil company who asked him to check with reference to an abstract concerning his land, and regarding the boundaries of the land involved in the law suit in 1933. This witness replied to such representative that there had never been any question about the boundary line as far as he knew, and that he believed there was an error in the abstract. The next time he heard about this matter, the tenant farming his land came to Denver, stopped at his office, and inquired of him why the surveyors were on his property in Kimball County. On May 20, 1955, Mr. Scott made a trip to Kimball to endeavor to find out what the trouble was. He testified that by coincidence that day the town paper had a notice of a hearing to be had in court. That was when he heard about the present action. He further testified that had he received a summons, he and Mrs. Scott would have gone to Kimball, as it is only 175 miles from Denver; and that the boundary line used by his tenant on his quarter section of land is the same as it was when he acquired it in 1918.

A. W. Freshman, a physician, testified by deposition admitted in evidence that his office is in the Metropolitan Building in Denver; that he is very well acquainted with Anna R. Scott and has known her since 1923, before he was a physician and afterwards; that she was employed by his senior partner who has since died, and this employment was at the same office he occupied; that she was his secretary and bookkeeper, and had been at this same office address since 1923 and worked every day except Sunday; that she is employed from 9 a.m., or before, until 5 p.m.; that he had no specific or particular recollection of the date of June 12, 1933; and that the reputations of Anna R. Scott and her husband for telling the truth and being reliable were excellent.

The deposition of John W. Blodgett, chief clerk in the

office of undersheriff of Denver County, Colorado, was admitted into evidence. This witness testified in regard to a certain document on file in his office described as a "jacket" containing the record of service upon the Scotts, which constitutes no part of the summons but is separate and distinct therefrom; that one of the documents in the jacket revealed that on June 12, 1933, at 1:40 p.m., service was made by deputy sheriff R. I. Shores on both R. Elmer Scott and Anna R. Scott; that from observation of the contents of the jacket, under the word "trips" this witness stated that it disclosed that in an effort to make the service three trips were made by a deputy sheriff to 1801 Grant Street, and one trip was made to 1255 South Pearl Street, both in Denver; that there is a tag, which is an exhibit, containing instructions to the deputy sheriff with reference to papers to be served; and that along with the papers to be served, as shown in this exhibit, information was given with reference to where R. Elmer Scott might be found. One such place was 1255 South Pearl Street where it was indicated he was employed as a bookkeeper for the Miracle Products Company, another was the address of his apartment, 1801 Grant Street or 333 East Sixteenth Avenue, and addresses where Anna R. Scott might be found. It required, in this instance, that service of the process must be personal. There were no other records directly concerning the service of process. On cross-examination Blodgett testified that the notation of trips written in pencil was intended as a memorandum to be completed by a deputy sheriff to enable him to make a record of the mileage he had traveled in attempting to make service, for the purpose of determining the fee to be charged; and that such memorandum is valuable to the office for computing the mileage to be charged for making the service. Another document within the jacket was a receipt for $3.55 from the clerk of the district court for Kimball County for payment of fees in connection with the service on the defendants

Scott. Another document in the jacket was a statement sent to the clerk of the district court for Kimball County requesting the payment of such fees. Blodgett further testified that no benefit for fees charged for making service inures to any person working in the sheriff's office, such fees are transmitted to the city and county treasurer.

The State makes the following assignment of error: The district court abused its discretion and erred in holding that there was sufficient proof, or proof of a clear and convincing nature, of a type to justify impeachment of the sworn return of the deputy sheriff of Denver County, Colorado.

The question involved in this appeal is whether or not the evidence is sufficient to impeach the return made on the summons.

In Westman v. Carlson, 86 Neb. 847, 126 N. W. 515, appears language that is applicable to the instant case and recognized in several cases in this jurisdiction, as follows: "The return of the officer is part of the judicial record of the case. It appears to be regular on its face. It shows in addition to the return that the sheriff charged mileage and fees for copies of the summons. He performed his duties under an oath of office and the penalties of an official bond. As to serving the writ and making the return, the presumption is that the officer performed his duty. Parker v. Starr, 21 Neb. 680. The return of a sheriff that he served a summons on defendant can only be impeached by clear and convincing proof. Connell v. Galligher, 36 Neb. 749; Unangst v. Southwick, 80 Neb. 119. This doctrine is essential to the integrity and permanency of judicial records." The court held: "Where the return of a sheriff recites that he served the summons, on which the return is indorsed, the presumption is that he performed his duty in making the service. * * * The return of a sheriff that he served a summons on defendant can only be impeached by clear and convincing proof."

As stated in Unangst v. Southwick, on rehearing, 80 Neb. 119, 116 N. W. 864: "We fear that it would be a dangerous precedent to adhere to a rule which would permit an officer's return to be superseded by such evidence as this. It would offer an opportunity for the practice of fraud and perjury, and the due administration of justice might be considerably hampered by dishonest litigants, who, after making no response to the process of the court, would appear collaterally and defeat the officer's return." However, we do not charge such motives to the defendants in the instant case. We do believe the circumstances in the instant case strongly corroborate the sheriff's return.

As stated in Janous v. Columbus State Bank, 101 Neb. 393, 163 N. W. 327: "When a judgment is attacked collaterally, or when a long time after the judgment is entered the correctness of the sheriff's return is assailed, great faith and credit must be given to the formal return of the officer."

In the case of De Lair v. De Lair, 146 Neb. 771, 21 N. W. 2d 498, this court said: "The rule is well established in this state that a sheriff's return on a summons is prima facie proof of the service therein indicated. * * * The return of an officer cannot be impeached except by clear and convincing evidence."

A review of cases above cited appeared in the De Lair case, together with other cases to which we make reference.

We stated in Connell v. Galligher, 36 Neb. 749, 55 N. W. 229: " 'Upon grounds of public policy, the return of the officer, even though not regarded as conclusive, should be deemed strong evidence of the facts as to which the law requires him to certify, and should ordinarily be upheld, unless opposed by clear and satisfactory proof.' " See, also, Wyland v. Frost, 75 Iowa 209, 39 N. W. 241; Campbell v. Harvard State Bank, 103 Neb. 562, 173 N. W. 587; Ault v. Stewart, 113 Neb. 47, 201 N. W. 639.

The defendants seek to impeach the service in the instant case on the grounds that the service of summons at the place and time shown on the record jacket in the office of the Denver County undersheriff could not have been had upon them on Monday, June 12, 1933, at 1:40 p.m., the reason being that each of the defendants was employed at a different place in Denver; that they were required to leave home early in the morning and return to their home late in the evening; and that neither the defendants nor any other witness could recall the events happening on June 12, 1933, some 23 years ago. The record jacket relating to service on the defendants at 1:40 p.m., June 12, 1933, is not conclusive, it is not sworn to with certainty that the defendants were so served. In any event, this record constitutes no part of the summons or the return thereon. The return of the summons itself does not give the alleged time of service. That testimony was taken from the record jacket. The clerk in the sheriff's office testified that the space referred to in the record jacket with reference to service of summons where the time was written in, was the place for the deputy to make memorandum for his convenience and the convenience of the office in computing mileage, and was not information that was part of the sworn statement of the return. In fact, the service of this summons, insofar as the return thereon is concerned, could have been had on the defendants at any place in Denver County, Colorado.

We conclude that the type of evidence submitted by the defendants is not that of clear, convincing proof necessary to impeach the sworn statement of an officer made in the course of his duty. The trial court had jurisdiction over the defendants and the subject matter of the action at the time the judgment was rendered on December 7, 1933. The trial court erred, as contended for by the State.

The State assigns as error and contends that a judgment which recites that the parties were present in

court, and where the record shows a service and return of summons sworn to by a deputy sheriff, under such circumstances the judgment is not subject to collateral attack to show that the court never had jurisdiction over the defendants. While there may be merit to this assignment of error, in view of our holding we deem it unnecessary to discuss it.

For the reasons given herein, we reverse the judgment of the district court and remand the cause with directions to enter judgment for the plaintiff, awarding to it all of Section 16, Township 16 North, Range 55 West of the 6th P.M., in Kimball County, Nebraska, as established by the resurvey which is a part of the record in this case.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., dissenting.

My disagreement with the court in this case relates not to the rules of law stated but to their applicability here, and if applicable, to the conclusion reached under them. Ultimately the question of the effect of undenied facts is involved.

The rules stated by the court all relate to the service of process by "an officer," the return made, and the presumptions that attach thereto.

The service here involved purports to have been made by a deputy sheriff of Denver County, Colorado. He was authorized to make service under an appointment of the sheriff of Kimball County which was directed to the sheriff or any deputy of Denver County. His authority was limited to the service of that writ. As such he was an agent of the sheriff of Kimball County and not an officer as the term is used in the rules upon which the court relies.

We had such an appointment in Nelson v. Robinson, 154 Neb. 64, 46 N. W. 2d 892. Without discussion we there treated the "private person" making the return as an "agent" of the sheriff of Scotts Bluff County.

This distinction runs through our decisions. For in-

stance in Forbes v. Bringe, 32 Neb. 757, 49 N. W. 720, there was an appointment of a special deputy to serve a writ. We referred to the return sworn to "by the person" who made the service.

The distinction has statutory recognition. Section 25-507, R. R. S. 1943, provides: "The summons shall be served *by the officer* to whom it is directed, who shall endorse on the original writ the time and manner of service. It may also be served *by any person* not a party to the action, appointed by the officer to whom it is directed. The authority of such *person* shall be endorsed on the writ. When the writ is served by a *person* appointed by the *officer* to whom it is directed, or when the service is made out of this state, the return shall be verified by oath or affirmation." (Emphasis supplied.)

Here the Legislature refers to the officer to whom the writ was directed. In this instance that officer was the sheriff of Kimball County. It refers to the "person" appointed by the "officer" to serve the writ. In this instance that "person" was the sheriff, or his deputy, of Denver County. Obviously the sheriff of Kimball County, as an officer, would have no authority to serve the writ in Colorado. Just as obviously his agent would have no authority as an officer to serve the writ.

The distinction does not rest upon the use of alternate words. A "person" serving the writ is required to verify his return on oath or affirmation. Why?

The reason appears in First Nat. Bank v. Anderson, 106 Neb. 204, 182 N. W. 1021, wherein we held: "In performing his official duty the sheriff acted under an oath of office and under the penalties of an official bond. There is a presumption that he performed his duty." The converse of the holding is that the "person" serving the writ is not an officer and not under oath and hence is required to verify under oath or affirmation. The converse of the holding is also that the presumption of the

performance of duty attaches to the "officer" and not to the "person."

Consistent with our statute and decisions other courts have held that the presumption in favor of the return of an officer does not exist where the return is made by a private person specially appointed to serve a writ. See, Simms v. Simms, 88 Ky. 642, 11 S. W. 665; Gardner v. Lincoln Bank & Trust Co., 251 Ky. 109, 64 S. W. 2d 497; Lynch v. West, 63 W. Va. 571, 60 S. E. 606.

Accordingly, it is my view that the court has decided this case on rules of law that are not applicable to the fact situation presented.

Now I go to the court's decision based on the rules it follows.

This action was originally brought in 1933. The Scotts were 2 of 12 individual defendants and there were also a corporate defendant and Kimball County—14 defendants in all. Two defendants, a husband and wife, answered.

The matter went to trial and judgment in 1933. In 1955 the State took its first action to enforce the judgment. The Scotts then answered, presenting the issue that the return of service by the sheriff's agent was false; that they had never been served; and that they had no knowledge of this action until 1955.

The parties made an investigation of the service at Denver. The person making the service was not found and was reported to be deceased. They did find the record in the office of the undersheriff of Denver which the majority recites. That record suggests the time of day of the purported service and either one of two places where the purported service was had. It suggests also that the person making the service did not know the Scotts and that he made three trips to the residence of the Scotts and one trip to the place of business where he had been advised Mrs. Scott was employed. It showed also that there was a charge of $2 for service, $1.05 for mileage, and 50 cents for a notary, or a total of $3.55.

The Scotts appeared at the trial, and submitted to examination and cross-examination. They established without contradiction, and with corroboration, that the service could not have been made at the time and place appearing in the records of the undersheriff's office.

The court brushes this evidence aside as not a part of the summons and return and anyway "the service of this summons * * * could have been had on the defendants at any place in Denver County, Colorado," insofar as the return is concerned. This holding rests on no fact suggested by the record. No one contended at the trial that service was had other than at one of the two named addresses.

The court overlooks the fact that there is a bridge between the records in the undersheriff's office and the return. On the return the charge for service, mileage, and notary is exactly the same as in the undersheriff's records. To that extent the court impeaches the veracity of the person making the return which the court accepts.

But I pass that.

Putting aside the undersheriff's records and the testimony of the Scotts relating thereto, there remains in this record evidence which cannot be brushed aside.

The Scotts also testified that they were not served with summons and had no knowledge otherwise of this litigation. That testimony was given in court, under oath, and subject to cross-examination. It stands unchallenged, uncontradicted, and unimpeached. It goes to service not only at "any place" in Denver County, but "any place" anywhere else.

So the court's decision then rests upon a consideration of the evidence of the Scotts which is found to be of no moment when weighed against the return of the person making the service.

The court recognizes that a return can be impeached "by clear and convincing evidence."

Wherein is the evidence of the Scotts lacking in clar-

ity? The court points out no lack of clarity but by a recital of the evidence shows the full, complete, unequivocal, and unambiguous denial of the Scotts.

Wherein is their evidence not convincing? It can only be on the basis of its rejection as false. Yet the court points out neither falsity nor basis of lack of credibility. The evidence was convincing to the trial court who heard the testimony and observed the witnesses. It is as clear and convincing as was the evidence in De Lair v. De Lair, 146 Neb. 771, 21 N. W. 2d 498, where this court set aside a sheriff's return made as an officer. I shall return to that decision later herein.

It seems that the only basis of rejection is the presumption that the court attaches to the return. The net of the decision, as I see it, is that the court in effect now returns to the old and generally rejected common-law rule that a return cannot be impeached. It would seem futile to try to impeach a return after this decision.

Now I apply another test to the instant decision, and that is the test of equality of litigants. It is a test suggested by the balanced scales cast in bronze in the doors of our courtroom.

How have other cases involving similar fact situations been decided?

I restate the basic fact situation here. The sworn, uncontradicted, unimpeached testimony of the Scotts is held to be outweighed by the return of the officer making the service. The return is challenged as false. The testimony of the Scotts is not.

In Graves v. MacFarland, 58 Neb. 802, 79 N. W. 707, a foreclosure decree, and later a deficiency judgment, were involved. The action was brought in Lancaster County. The sheriff of Antelope County was appointed to serve process on defendant Graves and wife. The return of the sheriff showed personal service upon Mrs. Graves and service upon Graves by leaving a copy at his usual place of residence. The Graves defaulted.

Judgment of foreclosure, and later a deficiency judgment, were entered against Graves. Graves brought an action to enjoin enforcing the judgments on the ground that he had not been served with summons. The agent of the Lancaster County sheriff (sheriff of Antelope County) testified that he served the summons as recited in his return. (There is no such testimony in the instant case.) Three witnesses, one disinterested, testified that the service was not made as returned at the Graves' residence. There this court weighed the evidence as to service at a particular time and place. Here the court puts that evidence aside. There we found on sharply conflicting evidence and contrary to the judgment of the trial court that the defendant had not been served, although the return was supported by the testimony of the person making the service. In the course of the opinion Judge Sullivan wrote: "* * * if service had really been made, it seems quite remarkable that Graves should give no attention whatever to the suit." And so here it seems quite remarkable that the Scotts "if service had really been made" paid no attention to this suit which involved their entire real estate holdings at the time.

I cannot reconcile the instant decision with the decision in Graves v. MacFarland, *supra*.

St. Paul Harvester Co. v. Mahs, 82 Neb. 336, 117 N. W. 702, involved a return made by a deputy sheriff (an officer) of Lancaster County. Default judgment was taken in 1890. Fourteen years later an effort was made to enforce the judgment. The issue of no service was raised. There the deputy sheriff testified that he must have made the service or he would not have so stated in his return. Here there was no such evidence. There the court weighed the evidence contrary to the return and found the return to be false, and sustained the defense. I mention this case because the court here holds that where the service is assailed "a long time after the judgment is entered * * * great faith and credit must

be given to the formal return of the officer." Parenthetically I suggest that a false return does not ripen into a true return by lapse of time.

I now return to the case of First Nat. Bank v. Anderson, *supra*. There the sheriff (an officer) returned the summons showing service at the usual place of residence. It was a foreclosure action. Default judgment was rendered and the property was sold. The defaulting defendants contended that they were not served with summons and had no notice of the suit. The trial court held for the purchaser at the sheriff's sale. We reversed the judgment, holding that the service had not been made. The sheriff testified to sustain his return. The proof tending to impeach his return was contradicted "in some minor particulars." Here the evidence of the Scotts is not impeached in any particular. In the course of the opinion Judge Rose wrote: "It is not likely that owners of land of such value would knowingly and willingly permit it to be sacrificed for the satisfaction of so small an indebtedness." So here it is unlikely that the Scotts would have knowingly and willingly permitted a suit to go by default that involved the title to one-fourth of their landholdings.

I now go to De Lair v. De Lair, *supra*. Six of the present seven members of this court participated in that unanimous decision. The action was one in divorce. The sheriff (an officer) recited in the return of the summons that he made service by leaving a copy at the usual place of residence. The divorce decree was rendered in 1934. Both parties remarried. Ten years later (a long time after the judgment was rendered) plaintiff sought to amend the return by showing service upon the defendant in person. The defendant joined in the motion. The cause was heard on affidavits and depositions. The interested parties testified that the service was made in person. They were supported by friends and relatives. The sheriff testified that his return was in all respects true and correct. We ordered the return

amended, although it was sustained by the testimony of the sheriff. Here the return stands alone—and we hold it must be accepted as true.

I cannot reconcile our decision in the De Lair case with the court's decision here. Interesting also is the fact that in the instant case the court cites the De Lair case for a rule of law and "a review of cases," but does not point out the diametrically opposite results in the De Lair case and the instant case.

I now review the decisions relied on by the court in their chronological order. I point out that in every instance the return was made by an "officer" as distinguished from "a person." I point out also that although we are confronted here with the question of the sufficiency of the evidence as a fact matter, the court does not see fit to mention any of the facts in the decisions upon which it relies.

Parker v. Starr, 21 Neb. 680, 33 N. W. 424, was a foreclosure action which required service upon minors and a guardian or father, and if not found, then upon the mother or person with whom the minors were living. The return showed service upon the minors and the mother. We held the service sufficient on the presumption that "the officer did his duty." The facts recited in the return were not challenged. The case has no factual resemblance to the case at bar.

Connell v. Galligher, 36 Neb. 749, 55 N. W. 229, involved a judgment rendered in 1859. Thirty years later one of the defendants offered evidence attacking the judgment on two grounds. The return showed personal service. The defendant offered evidence that he was not in Douglas County at the time of the purported service. George B. Lake appeared for the defendants "for the purpose of delay, there being no meritorious defense." The defendant contended that Mr. Lake was without authority to appear for him. The defendants were copartners. Mr. Lake testified that he was employed by a member of the firm. During the intervening

30-year period Mr. Lake was for many years a member of this court. We held that the burden of proof was upon the defendant to prove both propositions, and that he had proven neither one. We did not undertake to decide what the result would have been had he proven one and not the other. We held that the "proceedings" sustained the judgment.

Unangst v. Southwick, on rehearing, 80 Neb. 119, 116 N. W. 864, was a foreclosure action. The sheriff's return showed personal service of summons upon the defendant wife. She challenged that service as plaintiff in this action. The court's opinion quotes from this case to the effect that an officer's return cannot be "superseded by such evidence as this." So let's examine the evidence in that case.

There the sheriff's (officer's) testimony supported his return. Here there is no such supporting testimony. But let's go on.

Plaintiff testified that at the time of the purported service she was served with notice of an application for the appointment of a receiver in the same action but was not served with summons. All witnesses agreed that both notice and summons were served on the husband in the action where she was named as a party. It was held: "It seems improbable that he (sheriff) would serve upon the plaintiff only the notice of the application for receiver and make his return showing the service of the summons upon her. He had the opportunity to serve it. In the summons, both the husband and wife were named as defendants. We fear that it would be a dangerous precedent to adhere to a rule which would permit an officer's return to be superseded by such evidence as this."

It is upon that fact situation in the Unangst case that the rule relied on by the court in the instant case was announced applicable to "such evidence" as was there offered. That case is not this case factually.

We finally held in the Unangst case that plaintiff had

received "from the process of the court, actual notice of the pendency of the suit." The evidence other than the return showed the actual notice. In the instant case it does not. In the instant case the court cites no evidence, other than the return of the person serving, to sustain its holding. In the Unangst case the circumstances corroborated the sheriff's return. Here there are no such circumstances.

Westman v. Carlson, 86 Neb. 847, 126 N. W. 515, involved not personal service but service at the usual place of residence. There was no claim of personal service as in the instant case, and accordingly no denial of personal service as in the instant case. Of the three people who could have received the service at the usual place of residence, two were dead when an attempt was made to enforce the judgment 10 years after it was rendered by default. The remaining witness denied knowledge of the service but admitted that the summons could have been handed to either of the others. The decision rests upon the presumption that the officer performed his duty. That is not this case.

The court quotes from Janous v. Columbus State Bank, 101 Neb. 393, 163 N. W. 327. The quote is correct. However, in the next sentence we stated that it had no application to the facts of the case. Of course, that does not alter the rule. There the officer testified not "a long time after the judgment," but "soon after" the purported service was made. He handed the summons to an elderly lady who spoke English very little but did speak German. He told her "as near as I could" that it was a summons. She returned it to him and told him to give it to Joe—apparently a son-in-law, and a principal defendant. We held that what happened did not amount to service without proof that Mrs. Janous received the summons with knowledge that it was the service of a summons. After weighing the "officer's" testimony we held that the summons had not been served and set aside the judgment based thereon. Just where this

case, fact-wise, supports the court's fact conclusion is not at all clear to me.

The court cites but does not quote from Campbell v. Harvard State Bank, 103 Neb. 562, 173 N. W. 587. In this action the officer testified that he made personal service upon the wife who was sued with her husband and identified in the courtroom as the person served. There is no such identification here. The parties appeared by attorneys whose authority was not challenged. We concluded from the evidence that the defendants knew of the action and paid no attention to it because they thought they had no property subject to execution. We did not decide the case on the premise that the service of summons was good. The decision rests upon "a general rule that a court of equity will not set aside a judgment rendered in a case where the party complaining had full notice and knowledge of the pendency of the suit and took no steps to protect his interest at that time."

Ault v. Stewart, 113 Neb. 47, 201 N. W. 639, is cited by the court. This case states a rule of law about which there is no dispute. That the summons was served was not disputed. The question was whether service was had in Scotts Bluff or Sioux Counties. It was good if served in Scotts Bluff County and void if served in Sioux County. It was a fact matter not in anywise comparable to the problem here.

Finally we come to the crux of this case.

The testimony of the Scotts that they were not served would be accepted in any proceeding where that was the fact to be ultimately determined. The court does not refuse to accept the fact here. The court rejects the Scott testimony not because it is not true but because it is not the "type of evidence" necessary to overcome the return. Parenthetically it is the same "type of evidence" that appears in the cases where we have rejected the return showing service. This conclusion of the court relates back to the holding in Unangst v. South-

wick, *supra,* and to the case of Westman v. Carlson, *supra,* wherein we stated that it was "essential to the integrity and permanency of judicial records."

The facts in the two cases have been summarized above. But in those two cases the facts outside the return did not establish its falsity. Here the court holds that the return controls and is superior to the undisputed, unimpeached testimony of the Scotts.

The records of a court should be protected when they speak the truth and should be reformed to speak the truth when they do not. The integrity of the judicial process and the confidence of people in the courts require it. The rules which the court quotes admit the right and duty of a court to make the records speak the truth. But in the application here the truth is denied because it is in conflict with the record.

There is not involved here alone the theory of the integrity of judicial records. Constitutional rights of people to life, liberty, and property, and due process of law are involved.

To sustain a record as superior to those rights is a shocking thing.

DuBois v. Clark, 12 Colo. App. 220, 55 P. 750, is a case where an officer made a return showing personal service. One of the defendants purportedly served moved to vacate a judgment on the ground that service of summons was not made upon him. The trial court denied the motion. On appeal the question was whether if the return was false its falsity could be shown. The court discussed the old common-law rule that the return was conclusive and rejected that rule. It discussed presumptions that attached to a return. It discussed attempted service and the unreliability of a return where the officer did not know the parties to be served or where they could be found (a situation which exists in the instant case). The court then held: "But, aside from all this, section 25 of the bill of rights provides that no person shall be deprived of life, liberty or property,

without due process of law. The legislature has prescribed the process necessary where life or liberty is involved, and it has also prescribed the process necessary to the rendition of judgments in civil actions, by means of which parties may be deprived of their property. The process prescribed is actual process, to be actually served, in some one of the methods specified. *A person cannot be deprived of his life or liberty on a presumption, unless the presumption and the fact accord,* and as, in respect to process, the constitution places life, liberty and property upon an equality, *a party cannot be deprived of his property, without service of process in the manner provided by law.* A presumption of service may or may not be true, and, if it is false, a judgment entered upon it, if it is enforced by execution, results in depriving the person who is the subject of the presumption, of his property without due process of law." In effect we approved this rule in First Nat. Bank v. Anderson, *supra,* where we held that courts cannot strip landowners of title without notice to them.

Here a presumption not in accord with the proven facts is allowed to deprive the Scotts of the right to protect a valuable property right.

In the recent case of Iwerks v. People, 130 Colo. 86, 273 P. 2d 133, the court determined a question which involved a sheriff's return showing service. The court found that what papers, if any, were served was "a matter of grave doubt." It held: "In matters of this kind where grave doubt arises concerning what was actually done, that doubt must be resolved in favor of the person alleging that no service was made."

At best, from the view of the State, whether the summons was served here is a matter of grave doubt. I would follow the rule of simple justice, set aside this judgment, and allow the Scotts to defend. No rights of other parties have arisen during the intervening 22 years while the State stood by and did nothing. The

issue then was and now would be: What are the proper boundaries of the land involved?

The judgment of the trial court did not determine the issue of the land boundaries. It merely gave them the right to defend if the State elected to proceed with its action against them. I would affirm the judgment of the trial court.

One other matter in the opinion of the court requires mention.

I pointed out earlier herein that 2 of the 14 defendants answered. The transcript shows that trial was had. The judgment recites: "The parties being present in court" trial began on one day and continued the next day. The State contends that the above recital shows a voluntary appearance of the Scotts, equivalent to the service of process. The court holds that there "may be merit" to the contention but does not decide it. As I view it the contention is utterly void of any merit.

To sustain the State's contention would be equivalent to finding that all of the defendants, including the county and a corporation, not pleading, were present in court and thereby conclusively bound by the judgment.

The answering defendants in 1933 were the parties who owned the land to the north of Section 16. They were the ones who stood to lose a substantial acreage of their land if the 1928 survey was adjudged to be correct. It would be an assumption contrary to experience to hold that the Scotts sat in court for 2 days while the 1928 survey which sustained their holdings was under attack and did and said nothing then or thereafter when the court held that survey to be in error.

I mention the contention here only because it illustrates the extent to which the State is willing to go to sustain a judgment depriving the Scotts of one-fourth of their landholdings.

DONALD L. SPECK, APPELLEE, V. BETTY L. SPECK, APPELLANT.
82 N. W. 2d 540

Filed April 26, 1957. No. 34142.

1. **Divorce.** In a divorce case where the custody of minor children is involved, the custody of the children is to be determined by the best interests of the children, with due regard for the superior rights of fit, proper, and suitable parents.
2. ———. In awarding the custody of minor children the court looks to the best interests of the children and those of tender age are usually awarded to the mother if she is a fit and proper person to have their custody.
3. ———. Custody of minor children awarded to the mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree unless it is shown that the mother is an unfit person to have their custody, or that their best interests under all the circumstances require such action.
4. ———. Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments.

APPEAL from the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. *Motion to dismiss overruled. Judgment affirmed in part, and in part reversed and remanded.*

Sam S. Diedrichs, for appellant.

Beatty, Clarke, Murphy & Morgan, Donald W. Pederson, and *Frank E. Piccolo, Jr.,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an appeal from a judgment of the district court for Lincoln County modifying a decree of divorce by taking care, custody, and control of five minor children of the parties from the defendant and awarding their care, custody, and control to the plaintiff. The trial court also set aside the order for the support of the

children by the plaintiff. The cross-petition of the defendant praying for an increase in the amount of support money was dismissed. From the judgment so modifying the original decree of divorce the defendant appeals.

The evidence shows that on October 28, 1953, plaintiff, Donald L. Speck, commenced a suit for an absolute divorce from the defendant, Betty L. Speck. On January 18, 1954, the court granted an absolute divorce to the defendant and awarded her the care, custody, and control of the five minor children, to wit: Michael A. Speck, born February 16, 1946; Sandra Sue Speck, born June 26, 1947; Jo Ann J. Speck, born July 29, 1949; Sheila L. Speck, born July 7, 1950; and Daniel C. Speck, born September 21, 1951. Defendant retained the care, custody, and control of the children for approximately 2 years. On December 20, 1955, plaintiff filed an application for the modification of the decree of divorce as it related to the custody of the children. Defendant filed an answer denying the allegations of the petition for the modification of the decree and a cross-petition for an increase in the amount of support money for the children. There were several subsequent pleadings filed, including a supplemental petition, which do not appear important in determining the issues raised by this appeal. The case was tried and a judgment modifying the decree entered on June 20, 1956, transferring the care, custody, and control of the children to the plaintiff, Donald L. Speck. The appeal is from this judgment.

The record shows that plaintiff remarried on October 31, 1954. He has established a good home in Kearney, Nebraska, and he has the apparent means of properly caring for the children. His present wife desires to have the children in the home. The evidence sustains a finding that plaintiff and his wife are suitable persons to have the care and custody of the children. The real issue, however, is whether or not the evidence sustains the action of the trial court in taking the children from the care and custody of the natural mother.

The evidence shows that defendant lived in a residence property in North Platte which she rented from her father. It consisted of a living room, kitchen, utility room, and two bedrooms. The five children slept in two bunk beds in one bedroom. The defendant slept in a double bed in the other bedroom. In the spring of 1954, defendant became enamored with one Clarence Watkins, a married man. At the beginning of their relationship he was delivering milk at the home of the defendant. He began taking meals at the defendant's home. His automobile was seen parked at her residence late at night and as early as 6:30 a.m. on numerous occasions. The defendant admits that Watkins stayed all night on three occasions, but insists that he slept on the davenport in the living room with his clothes on. They went to church together a few times. Defendant admits that Watkins took her to shows and sometimes took her automobile riding. She denies that she had any improper relations with him. She admits that she had agreed to marry Watkins when his divorce was obtained. The evidence is clear that Watkins corrected and disciplined the children and assumed more than a casual interest in the defendant at all times during the day and night. The record shows that he moved some of his furniture into defendant's garage, and set up a vegetable juicer in the utility room and sold vegetable juices as a means of livelihood. He used defendant's automobile in making his deliveries. Irrespective of all these evidences of a clandestine relationship, defendant denies having intimate relations with Watkins.

This court had a similar situation before it in Yost v. Yost, 161 Neb. 164, 72 N. W. 2d 689. We there said: "The record is replete with admissions by the defendant and Fanning which show the whole plan. Each admitted being married at the time they carried on their clandestine relations. They deny any sexual relations until after their purported marriage on May 1, 1954, but the acceptance of such evidence at its face value

would tax the credulity of a self-respecting court." The foregoing has particular application to the present case. It is contended that the evidence does not establish illicit relations by these parties. Direct evidence, of course, is not ordinarily procurable to establish such improper conduct. But where the evidence and circumstances show, as they do here, that every element is present except direct proof of the act itself, the court is not required to close its eyes to the obvious. It may properly determine even as against the protestations of one or both of the parties that the result followed which usually grows out of such a relationship. In any event, a proper regard for the welfare of her children required the defendant to refrain from conduct which would reflect upon her and produce harmful effects upon these small children. The evidence sustains a finding that the children were being cared for in improper and unfit surroundings and that the defendant was an unfit person to have their care and custody.

The law governing such cases is well settled. In Gorsuch v. Gorsuch, on rehearing, 143 Neb. 578, 11 N. W. 2d 456, it was stated in the following language: "The proper rule in a divorce case, where the custody of minor children is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper and suitable parents."

In awarding the custody of minor children of tender years under the foregoing rule, the best interests of the children usually require that they be given into the care and custody of the mother if she is a suitable and fit person. When the care and custody of minor children have been awarded to the mother in a divorce action, such custody will not ordinarily be disturbed in a subsequent proceeding to modify the original decree unless it is shown that the mother is an unfit person to have their custody. Bath v. Bath, 150 Neb. 591, 35 N. W. 2d 509; Lichtenberg v. Lichtenberg, 154 Neb. 278, 47 N. W.

2d 575; Cowan v. Cowan, 160 Neb. 74, 69 N. W. 2d 300. The evidence sustains a finding that the mother is an unfit and unsuitable person to have the care and custody of these minor children. Since the trial court came to the same conclusion, its finding to that effect must be sustained.

The defendant asserts that the trial court erred in placing the care and custody of the children in the plaintiff and his present wife, Eleanor. One of the objections is that Eleanor had three children by a previous marriage and that their care and custody had been awarded to their father. The record shows that Eleanor and her former husband, together with their children, had moved to Nebraska from New York. The father took the children and returned to New York where divorce proceedings were instituted. Eleanor testifies that she had no funds to contest the divorce and that the children were awarded to the father by default. We do not think this in itself makes her unfit and unsuitable in assisting the plaintiff in rearing his children.

We conclude from the evidence that the trial court properly found that defendant was an unfit and unsuitable person to have the care and custody of these minor children. We think the evidence shows that plaintiff is a fit and proper person to have their care and custody. The judgment of the trial court so finding is therefore correct.

The defendant complains of the dismissal of her cross-petition for additional support money for the children. In view of our findings hereinbefore made, the cross-petition was properly dismissed.

It appears also that plaintiff was cited for contempt for failure to pay delinquent child-support money. While the trial court did not directly rule on the merits of the citation for contempt, it is apparent that it held for the plaintiff when it set aside its previous award of support money and relieved the plaintiff of all past due pay-

ments. The effect of this finding is to hold the plaintiff not guilty of contempt.

That part of the court's order purporting to release the accrued payments for the support of the children is erroneous. The trial court has no such authority. The rule is: Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments. Wassung v. Wassung, 136 Neb. 440, 286 N. W. 340; Clark v. Clark, 139 Neb. 446, 297 N. W. 661; Ruehle v. Ruehle, 161 Neb. 691, 74 N. W. 2d 689. That part of the order vacating the accrued payments for child support is reversed.

Plaintiff filed a motion to dismiss the appeal for the reason that defendant and Watkins have married and moved to Denver, Colorado, subsequent to the trial of this case. This affords no basis for a dismissal of the appeal. The motion to dismiss is overruled.

MOTION TO DISMISS OVERRULED. JUDGMENT AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

LORETTO MCLAUGHLIN, INDIVIDUALLY, AND LORETTO MCLAUGHLIN AS EXECUTRIX OF THE ESTATE OF EDWARD P. MCLAUGHLIN, DECEASED, APPELLEE, V. HELEN MCLAUGHLIN HEATH ET AL., APPELLANTS.

82 N. W. 2d 533

Filed April 26, 1957. No. 34152.

1. Wills. In the construction of a will, the court is required to give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with the rules of law.
2. ———. Parol evidence is inadmissible to determine the intent

of a testator as expressed in his will, unless there is a latent ambiguity therein which makes his intent obscure or uncertain.

3. ———. Where in a will there is a patent ambiguity resulting from the use of words, and nothing appears within its four corners to resolve or clarify the ambiguity, the words must be given their generally accepted literal and grammatical meaning.

4. ———. A will speaks as of the date of the death of the testator.

5. ———. Evidence to support a contention that a will is enforceable by reason of a contractual obligation must be clear, satisfactory, and unequivocal.

APPEAL from the district court for Lancaster County: PAUL W. WHITE, JUDGE. *Affirmed.*

Lester L. Dunn, for appellants.

Richard W. Smith and *Woods, Aitken & Aitken,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action by Loretto McLaughlin, individually, and as executrix of the estate of Edward P. McLaughlin, deceased, plaintiff and appellee, against Helen McLaughlin Heath, Ann McLaughlin Hauptman, and Jane McLaughlin Hudson, defendants and appellants, the object and purpose of which is to have construed the last will and testament of Edward P. McLaughlin and procure a decree quieting title to all of the real estate of which Edward P. McLaughlin died seized in the plaintiff individually.

After joinder of issue the case was tried and a decree was rendered granting all of the relief prayed by plaintiff. Motion for new trial was filed and in due course overruled. From the decree and the order overruling the motion for new trial the defendants have appealed. They assign as ground for reversal that the trial court erred in determining that the plaintiff became the sole devisee of all of the estate of Edward P. McLaughlin,

deceased, and that the defendants have no interest whatsoever in any of the estate.

It is pointed out here that the plaintiff is the widow of Edward P. McLaughlin and that the defendants are his daughters and daughters of the plaintiff.

The facts relating to this controversy are not in dispute in any material respect. The facts as they appear are that on or about January 16, 1951, the plaintiff and Edward P. McLaughlin executed a will containing, among other provisions not necessary to be repeated herein, the following:

"We, Edward P. McLaughlin and Loretto McLaughlin, husband and wife, of Lancaster County, Nebraska, both being of sound mind and disposing memory, do hereby make our joint and mutual Will in manner and form following, that is to say:

"1. The first to die directs that his or her funeral expenses, just debts and the costs and expenses of administration of his or her estate be first paid.

"2. The first to die hereby gives, devises and bequeaths to the survivor absolutely and forever the remainder of his or her estate, both real and personal, after the payment of the obligations referred to in Paragraph 1 hereof.

"3. On the death of both of the joint makers of this Will, we give, devise and bequeath to our three daughters, Mrs. Arthur H. Hudson, of Lincoln, Nebraska, Helen McLaughlin of Lincoln, Nebraska, and Mrs. Charles M. Hauptman of Lincoln, Nebraska, all our real and personal property of every description and wherever situated, absolutely and in fee simple and to their heirs and assigns forever."

This is on its face a joint will. Nothing appears in it to indicate that it depended upon any contractual understanding or consideration. There is no contention in the presentation of the parties that it in any wise so depends.

The plaintiff contends that by the paragraph num-

bered 2 she as the survivor of Edward P. McLaughlin took his estate absolutely and in fee simple free from any claim of the defendants.

The defendants contend that by the paragraph numbered 3 the estate which plaintiff took under the will was limited to a life estate with remainder to the defendants.

The plaintiff contends that paragraph 3 is not a limitation upon paragraph 2 but is a provision for the disposition of the estate of plaintiff and of Edward P. McLaughlin in case of death of the two at one and the same time.

The district court by its decree sustained the contentions of the plaintiff and rejected those of the defendants. A proper resolution of the controversy must be made agreeable to certain well-established rules for the construction of wills.

One rule is the following: "In the construction of a will, the court is required to give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with the rules of law." Martens v. Sachs, 138 Neb. 678, 294 N. W. 426, 134 A. L. R. 356. See, also, In re Estate of Pfost, 139 Neb. 784, 298 N. W. 739; Lacy v. Murdock, 147 Neb. 242, 22 N. W. 2d 713; Olson v. Lisco, 149 Neb. 314, 30 N. W. 2d 910; Brandeis v. Brandeis, 150 Neb. 222, 34 N. W. 2d 159.

Another rule is: "Parol evidence is inadmissible to determine the intent of a testator as expressed in his will, unless there is a latent ambiguity therein which makes his intent obscure or uncertain." Lincoln Nat. Bank & Trust Co. v. Grainger, 129 Neb. 451, 262 N. W. 11. See, also, Martens v. Sachs, *supra;* In re Estate of Pfost, *supra;* Brandeis v. Brandeis, *supra;* Scriven v. Scriven, 153 Neb. 655, 45 N. W. 2d 760.

Another is: "Where in a will there is a patent ambiguity resulting from the use of words, and nothing appears within its four corners to resolve or clarify the

ambiguity, the words must be given their generally accepted literal and grammatical meaning." In re Estate of Pfost, *supra*. See, also, Brandeis v. Brandeis, *supra*.

Another is: "A will speaks as of the date of the death of the testator." Brandeis v. Brandeis, *supra*. See, also, Lacy v. Murdock, *supra*.

Another is: "Extrinsic evidence is admissible to prove that a will contains a latent ambiguity and to explain the ambiguity for the purpose of arriving at the true intent of the testator." Borah v. Lincoln Hospital Assn., 153 Neb. 846, 46 N. W. 2d 166.

In an approach to the determination of this case it is pointed out that the plaintiff in her presentation here does not contend that the testator could not have by appropriate provision limited the estate to be taken by plaintiff under the language of the will to less than a fee, but only that he did not do so. On the other hand it is not contended that in the absence of limitation in the will fee simple title would not have passed to plaintiff by paragraph 2. The substantial contention of the defendants is that paragraph 3 is a limitation and that by it the plaintiff took a life estate in the lands of Edward P. McLaughlin rather than a fee simple title thereto.

On the face of the will there is uncertainty as to the intended application of paragraph 3. On its face the declaration is joint as to disposition of property. The plaintiff urges that by its terms it contemplates that joint application would become effective only on the simultaneous death of plaintiff and Edward P. McLaughlin.

If that is the proper interpretation, of course in the event of separate death of one or the other of the two, the defendants would never take anything by the terms of the will. After the death of one the survivor would have and possess all of the property of both free from any present or future claims of the defendants. Taken by itself it cannot well be said that the paragraph is

incapable of this interpretation. It does not however exclude other interpretations.

On the other hand the defendants contend substantially that by the terms of paragraph 3 the two parties in the execution of the will expressed the intention that the property of the first to die should pass to the other for life and that at the death of the survivor it should pass to the defendants. We cannot say that the paragraph is incapable of this interpretation, but it does not exclude other interpretations.

By the terms of paragraph 3 it is provided that the property of both would pass to the defendants, but we are directly concerned here only with what, if any, of the estate of Edward P. McLaughlin would pass to the defendants. We are concerned only academically with the question of whether or not, if paragraph 3 is a limitation upon the estate contemplated by paragraph 2, the estate which plaintiff had in her own right at the time of her husband's death would be in anywise affected by the paragraph. We are not unmindful however of the possibility that what is said herein may have the ultimate effect of declaring the intent of the plaintiff with regard to her own property by what was said in the will.

In Brandeis v. Brandeis, *supra*, it was said: "Where on the basis of the language employed by a testator a will is capable of more than one interpretation the ambiguity is patent and not latent and extrinsic evidence is inadmissible to aid in its interpretation."

Since, as pointed out, the provisions of this will are capable of more than one interpretation it becomes necessary to say that it contains a patent ambiguity. It therefore becomes necessary, agreeable to authority cited herein, to ascertain the true intent of the testator from what is contained within the four corners of the will and in so doing to give the words employed their generally accepted literal and grammatical meaning.

From this will it is clear that by the terms of paragraph 2 the only thing attempted was that the survivor

should have and possess the property of the other. There is nothing in the will anywhere to indicate that this was based upon any kind of mutual promise, agreement, or consideration. No such contention is made by the defendants. It is only in instances where it is contended and the contention is supported by proof which is clear, satisfactory, and unequivocal that a decision may rest on the proposition that the terms and effect of a will depend upon a contract. This is the rule as applied to actions for specific performance and obviously it is applicable in other instances where contractual obligations sought to be enforced are brought into question. Petersen v. Hitchcock, 128 Neb. 381, 258 N. W. 669; Rogers v. Casady, 134 Neb. 227, 278 N. W. 267.

There is nothing in paragraph 3 which in anywise purported to burden the separate estate of the survivor in case one of the parties predeceased the other. There is nothing in it which purported to burden the devised estate in the hands of the survivor. On the face of paragraph 2 the conclusion is inescapable that within legal contemplation the action of the two parties had several as distinguished from joint application.

It is not until paragraph 3 is examined that any phase of joint intention or action becomes apparent. As pointed out the defendants contend that the intent and purpose of this paragraph was to limit the devise of paragraph 2 to a life estate. If this is true, in legal contemplation, in view of the absence of anything to disclose any contractual or mutual action based on consideration in the making of the will, it would not effect a disposition of the estates of both parties at the death of the survivor. Under such circumstances the survivor would of course have full control of the disposition of his or her estate after the death of the first to die.

It may not be presumed that the parties intended anything less by the will than a full and complete disposition of their separate estates under a condition where, consistent with law, there could be such a full and com-

plete disposition.

The language of paragraph 3 permits without inconsistency and without putting any strain upon it, an interpretative intent the effect of which would be to accept the declared intent and purpose of paragraph 2 and at the same time give effect to paragraph 3 as a full and complete disposiiton of the estates of both of the parties.

This interpretation would have the effect of saying that when the parties used the words "On the death of both of the joint makers of this Will," they intended to say that if they died at the same time paragraph 3 should provide the mode and method for the disposition of their respective estates. Significantly, it is believed, in this quoted statement the parties speak of one death but of two parties. Of course words may be employed in different senses, but in the interpretation of a patent ambiguity in a will, as pointed out, the courts must base decisions upon the literal and grammatical meaning of words and phrases as they appear in the will itself.

To accept this interpretation of paragraph 3 does not destroy or burden any of the other provisions of the will. It allows full effectiveness to all of the provisions.

Accordingly the conclusion is reached that the construction contended for by plaintiff has been sustained. In consequence of this the judgment of the district court is affirmed.

AFFIRMED.

SIMMONS, C. J., dissenting.

Plaintiff pleaded for a construction of the will and for a decree quieting title in her. Defendants pleaded that plaintiff acquired only a life estate and that the fee was in them. They prayed only for a dismissal of the petition.

I disagree with the court's construction of the will.

The plaintiff testified in this case in the trial court. Without objection, and in patent violation of many basic rules of evidence, plaintiff by leading and suggestive questions testified as to conclusions of not only her in-

tent in making the will but as to the intent of her deceased husband. By that process she was led down the pathway of a theory of simultaneous death, as in the minds of both the makers of the will, which nullifies many of its provisions.

The court properly holds that that evidence was inadmissible, but it was admitted without objection. The court rejects the evidence and construes the will in accord with it. The suggestion of simultaneous death intentions is not found in the will. It is in the testimony of the plaintiff.

The defendants offered no evidence.

On appeal here defendants cite section 76-205, R. R. S. 1943, as to the construction of instruments. They then cite Annable v. Ricedorff, 140 Neb. 93, 299 N. W. 373, point out its differences and similarities with the instant case, and conclude that it "would appear" that the defendants receive the fee under the will and the plaintiff the life estate.

The court states that it becomes necessary to ascertain the true intent of the testator (singular) from what is contained within the "four corners of the will" and give the words employed their "generally accepted literal and grammatical meaning."

The court construes the will to be the will only of the first testator to die, except in the case of simultaneous deaths of both testators. It reaches that conclusion although stating that it will not be presumed that the parties intended anything less than "a full and complete disposition of their separate estates." The survivor is without a will, although she is the maker of a "joint and mutual" will. It is now a nullity. No such intent can be gathered from this "joint and mutual" will.

We have held that simultaneous means taking place at the same time. Securities Credit Corp. v. Pindell, 153 Neb. 298, 44 N. W. 2d 501.

I readily agree that a will could provide for the dis-

position of property in the event of simultaneous deaths. There is always the possibility of simultaneous deaths of a husband and wife who live and often travel together. Common knowledge, however, is that such deaths happen rarely.

Had the makers of the will contemplated such a situation and revealed that intent to the scrivener, a few simple words would have sufficed to state it. But they were not used.

The will does not suggest the intent to devise to meet that contingency. It is only by starting with that premise dehors the will that the conclusion is reached which the court sustains.

The court states the necessity of examining what is contained within the four corners of the will and yet it sets out only the opening paragraph and the first three numbered paragraphs of the will. It states that the others are not necessary to be stated.

The court omits two paragraphs which comprise over 40 percent of the body of the will. Both bear number 5. I state them as 5(a) and 5(b):

5(a). "At his request, *we* have made no provision for our son William McLaughlin of Atchison, Kansas, and for reasons best known to him and to us; however, *we* rely upon our said daughters to see to it that he is well provided for during the term of his natural life. *We* have full confidence in our said daughters to carry out this request." (Emphasis supplied.)

5(b). "The one dying first hereby appoints the other executor or executrix hereof, and upon the death of both of us, the joint makers of this Will, we appoint our daughters, Mrs. Arthur H. Hudson, Helen McLaughlin, and Mrs. Charles M. Hauptman, as executrices hereof, and we further empower Edward P. McLaughlin or Loretto McLaughlin, if appointed as executor or executrix hereof, and our said three daughters if appointed executrices under this Will to sell and convey without the order of any Court any real estate wheresoever lo-

cated belonging to *this estate.*" (Emphasis supplied.)

These two paragraphs contain provisions that go to the question of the intent of the makers. I would go to the entire will and to its four corners.

The opening sentence of the will begins with "We" followed by "both" and later by "our joint and mutual Will." The language does not indicate an intent that the makers were drafting a will applicable only to the estate of the first to die except in the case of simultaneous deaths of the two makers. No such suggestion appears in that provision.

The last two words of the will are "this estate." That indicates that the makers of the will contemplated one estate (not estates). By the will they were, in intent, merging their separate estates and making a complete disposition of "this estate."

This is a common provision in wills of husband and wife. Clearly, so far as paragraph 2 is concerned, there is no basis for reading a simultaneous death intent into the will. This provision by its clear language applies only in the event of a nonsimultaneous death.

Paragraph 3 of the will clearly contemplates that "this estate" shall vest in the three daughters "On the death of both of the joint makers." The language used is "all *our* real and personal property." The court construes this to mean as providing for the disposition of the estate only in case of simultaneous deaths. Had such an intent been revealed to the scrivener, the easy statement could have been: "In the event of the simultaneous deaths of the joint makers." Such language was not used and such an intent is not suggested by the will. The paragraph is one making an all-inclusive, general disposition of "our" property. The court construes it to be a paragraph applicable only in the event of the possible contingency of simultaneous deaths.

Paragraph 5(a) explains the omission of a son from the benefits of the will. It is a statement that came from the heart of parents. It expresses a trust in the

daughters, who are beneficiaries in the will, to care for the brother. It expresses the desire of each testator by the use of the word "we" repeatedly in the paragraph.

As the court construes the will that natural desire of the parents and the trust in the daughters were intended to be made effective only in the case of simultaneous deaths. In the absence of simultaneous deaths this court, in result, holds that it was the intent of the makers that the survivor was free to make "no provision for our son." The daughters, although they may later inherit their mother's estate are likewise free from the moral obligations of the trust. I find no suggestion in the will of such an intent. The desire of the father that his son be "well provided for during the term of his natural life" is now optional with the mother.

Paragraph 5(b) starts: "The one dying first * * *." This clearly does not contemplate simultaneous deaths. It recognizes the natural probability of nonsimultaneous deaths. The paragraph, and as a part of the same sentence, provides that "upon the death of both of us" the daughters are appointed as executrices of the will. Taken together these two clauses clearly indicate a quite natural desire and intent that when the first of the makers dies and the will is probated as to that joint maker, the other maker is to be executor of the "joint and mutual will"; and that when the other joint maker dies and the will is probated as to that maker the daughters are to be executrices. It is a normal provision and one that does not in anywise suggest an intent to have it apply only in the event of the simultaneous deaths of the two makers.

The remaining provision of paragraph 5(b) is a general grant of power to sell and convey. It goes first to either of the two makers who survives. It obviously excludes the contingency of simultaneous deaths. If it was the intent of the makers that paragraph 3 was only to apply in the event of simultaneous deaths and that in the event of nonsimultaneous deaths the fee title to

the property vested in the surviving maker, then the survivor would have the power of sale as a matter of law and this provision would be surplusage.

If the daughters were to take under the will only in the event of simultaneous deaths, then they would be receiving a fee title with a like power of sale as a matter of law.

It was suggested in oral argument that this power of sale was included so as to permit a sale to pay debts and costs of administration. Had that been the intent it could have been quite easily expressed in the will. It was not so expressed. It is also obvious that the value of this estate is such that a power of sale for that purpose was not necessary and was not contemplated.

As the court construes the will, except in the case of simultaneous deaths, only paragraphs 1 and 2 are effective and then only as to the "joint and mutual" maker first to die. A "full and complete disposition of their separate estates" is not had. The "four corners" of the will are reduced to include only these two paragraphs:

"1. The first to die directs that his or her funeral expenses, just debts and the costs and expenses of administration of his or her estate be first paid.

"2. The first to die hereby gives, devises and bequeaths to the survivor absolutely and forever the remainder of his or her estate, both real and personal, after the payment of the obligations referred to in Paragraph 1 hereof."

I would reverse the judgment of the trial court and remand the cause with directions to render judgment holding that the plaintiff was devised a life estate and that the defendants were devised the fee title subject to the plaintiff's life estate, and I would do that although the defendants did not pray for such a construction of the will.

DAVID P. LINDQUIST, APPELLANT, V. L. M. TOWLE, APPELLEE.
82 N. W. 2d 631

Filed April 26, 1957. No. 34173.

1. **Judgments: Appeal and Error.** A final judgment is one that disposes of the case either by dismissing it before hearing is had upon the merits, or after trial by rendition of judgment for the plaintiff or defendant. A judgment or order is not final unless it determines the rights of the litigants and precludes further inquiry.
2. **Appeal and Error.** An order sustaining a demurrer to a petition, without a dismissal or other final disposition of the case, is not a final order reviewable on appeal.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Appeal dismissed.*

David P. Lindquist, pro se.

Max G. Towle, Farley Young, and *Thomas J. McManus,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiff, David P. Lindquist, filed a petition in the district court seeking specific performance by defendant, L. M. Towle, of his alleged statutory duty, as clerk of the Lincoln Municipal Court, to accept and file a request for trial on the merits and other papers with relation thereto in an action filed by plaintiff in that court, while hearing on a special appearance was pending therein. Plaintiff also sought to reverse a municipal court order sustaining such special appearance and to recover damages and attorney's fees from defendant.

Defendant filed a general demurrer to plaintiff's petition. Plaintiff then filed a showing in opposition thereto in which he requested a judgment in favor of plaintiff upon the facts allegedly admitted by defendant's demurrer, the effect of which was simply to contend that plaintiff's petition did plead facts sufficient to state a

cause of action. After a hearing upon defendant's demurrer, it was sustained and plaintiff's request for judgment was refused, the effect of which was to simply conclude that plaintiff's petition did not state a cause of action.

Thereafter, plaintiff did not elect to stand upon his petition, and no judgment was rendered by the trial court disposing of the case and terminating the litigation in that court. Nevertheless, plaintiff appealed to this court, assigning among other things that the trial court erred in sustaining defendant's demurrer and refusing plaintiff's request for judgment in his favor.

In Anson v. Kruse, 147 Neb. 989, 25 N. W. 2d 896, we said: "A final judgment is one that disposes of the case either by dismissing it before hearing is had upon the merits, or after trial by rendition of judgment for the plaintiff or defendant. A judgment or order is not final unless it determines the rights of the litigants and precludes further inquiry." Therein we held: "An order overruling a demurrer to a petition, in the absence of further proceedings, is not a final order reviewable on appeal." See, also, Barry v. Wolf, 148 Neb. 27, 26 N. W. 2d 303.

In Koehn v. Union Fire Ins. Co., 151 Neb. 859, 39 N. W. 2d 808, we held: "An order sustaining a demurrer to a petition, without a dismissal or other final disposition of the case, is not a final order reviewable on appeal."

Such rules are applicable and controlling here. Accordingly, we conclude that plaintiff's appeal should be and hereby is dismissed at plaintiff's costs.

APPEAL DISMISSED.

J. HAMMOND MCNISH, ADMINISTRATOR OF THE ESTATE OF BUREL KINNEY, DECEASED, APPELLANT, V. GENERAL CREDIT CORPORATION, A CORPORATION, APPELLEE.

83 N. W. 2d 1

Filed May 3, 1957. No. 34125.

1. **Pleading.** An admission made in a pleading on which the trial is had is more than an ordinary admission. It is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and is therefore a limitation of the issues.
2. **Parties.** The real party in interest is the person entitled to the avails of the suit.
3. **Parties: Contracts.** A person with whom or in whose name a contract is made for the benefit of another may bring an action thereon without joining with him the person for whose benefit it is prosecuted.
4. **Witnesses.** A party is entitled to the benefit of the testimony of other witnesses in contradiction of his own, whenever his own is not of the character of a judicial admission and concerns only some evidential or constituent circumstance of his case.
5. **Penalties: Forfeitures.** Ordinarily courts of equity will refuse to aid in the enforcement of penalties and forfeitures and leave the parties to whatever remedies they may have at law. However, this is not an absolute or inflexible rule and should yield when good reason exists for doing so.
6. **Interest.** A borrower coming under the statutes relating to installment loans is not regarded as being in pari delicto but rather as being in vinculus to the lender, to whom he therefore owes no duty in equity. Insofar as Grand Island Finance Co. v. Fowler, 124 Neb. 514, 247 N. W. 429, is in conflict herewith it is overruled.
7. **Usury.** A truck dealer may in good faith sell a truck on time for a price in excess of the cash price without tainting the transaction with usury, even though the difference in the two prices may exceed lawful interest for a loan.
8. ———. A time sale made in good faith at a price in excess of a cash price, which time price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not be regarded as being tainted with usury, even though the difference exceeds the lawful interest for a loan.
9. ———. In order to have the foregoing principles apply it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash

sale price. It is not enough to merely show that the instruments signed evidencing the indebtedness refer to a time price or time differential when, in fact, the buyer was never quoted a time sale price as such.

10. ———. The statutes make no requirement that a borrower, in order to come within the provisions thereof, must be a necessitous one. In fact, the statutes relating to installment loans have no requirements of any kind in that respect and, in view of that fact, we would not be justified in so limiting the application thereof.

11. **Principal and Agent.** Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority.

12. ———. Whether or not an act is within the scope of an agent's apparent authority is to be determined under the foregoing rule as a question of fact from all the circumstances of the transaction and the business.

13. ———. If the principal desires to repudiate the unauthorized act of his agent, he must, as soon as he acquires knowledge of the facts, return, or tender a return, of any benefits by him received as the proceeds of such acts, or be held to have ratified them.

14. ———. A principal who accepts the benefits of a contract executed in his behalf by an agent is chargeable with the instrumentalities employed by the latter in procuring it.

APPEAL from the district court for Cheyenne County: JOHN H. KUNS, JUDGE. *Reversed and remanded with directions.*

Ewald D. Warnsholz and *J. Max Harding*, for appellant.

Harold A. Prince, Walter P. Lauritsen, Conway & Irons, and *Martin, Davis & Mattoon*, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for Cheyenne County. Therein, on March 1, 1955, Burel Kinney

brought an action against the General Credit Corporation. The purpose of the action, as set forth in plaintiff's amended petition filed April 2, 1955, on which the action was tried, is to have declared null and void an alleged installment loan in the principal sum of $10,000, made by defendant to plaintiff, because the interest charge of $1,200 made for the use thereof is in violation of the maximum amount authorized by the provisions of section 45-138, R. S. Supp., 1953, which statute deals with "Installment Loans" of over $1,000. The relief asked is that the promissory note evidencing the indebtedness be held null and void and that defendant be required to refund to plaintiff all payments it has received thereon from plaintiff. The primary defense pleaded is that the indebtedness owing from plaintiff to defendant is not a loan but the balance due on the time purchase price plaintiff agreed to pay for a used truck and therefore not subject to the provisions of the foregoing statute. The trial court found for the defendant and dismissed plaintiff's action. Plaintiff thereupon filed a motion for new trial and this appeal is from the overruling thereof.

Plaintiff was accidently killed on January 16, 1956, and this action was thereafter, on February 28, 1956, revived in the name of J. Hammond McNish as administrator of his estate. We shall hereinafter refer to decedent as Kinney.

Kinney had been engaged in the trucking business with headquarters near Sidney in Cheyenne County, Nebraska, since November 25, 1951. Appellee is a Nebraska corporation with its principal place of business in Hastings, Nebraska, where, at all times herein material, it was licensed to and operating an installment loan business at 615 West Second Street. The Hastings Motor Truck Company, a Nebraska corporation, was, at all times herein material, engaged in the selling and servicing of trucks with its principal place of business located in Hastings. Clinton J. Sahling, hereinafter

referred to as Sahling, was a stockholder, the vice-president, and a salesman of this corporation, which we shall hereinafter refer to as H. M. T. Co.

On June 22, 1954, in response to a telephone call from Kinney on June 21, 1954, Sahling went to Sidney where, on June 23, 1954, he met Kinney and, in the presence of Mrs. Kinney, negotiated the sale to him of two used trucks, the sale of one of which is the basis of this action. We shall more fully set out the facts relating to the sale of this truck in connection with our discussion of the nature of the indebtedness herein involved for the principal question to be determined is whether or not the contract entered into was a sale on time, with deferred payments, or one for cash, with a loan being made to pay the balance of the purchase price.

As a preliminary we shall briefly answer three propositions raised but not discussed. The transaction herein involved was entered into at Kinney's place of business near Sidney in Cheyenne County, Nebraska. Consequently the district court for that county had jurisdiction of the subject matter. See § 25-404, R. R. S. 1943. It provides in part: "Actions for the following causes must be brought in the county where the cause or some part thereof arose: (1) An action for the recovery of a fine, forfeiture, or penalty, imposed by a statute, * * *."

Article I, section 3, of the Constitution of Nebraska, provides: "No person shall be deprived of life, liberty, or property, without due process of law." We think sections 45-124 and 45-125, R. R. S. 1943, adequately meet this constitutional requirement. They provide, insofar as here material, as follows:

"No license shall be granted to any person unless and until such applicant therefor shall file with the Department of Banking a designation in writing that appoints the Director of Banking to act as applicant's agent, upon whom all judicial and other process or legal notices directed to such applicant may be served. Service upon the agent, so designated, shall be equivalent to

personal service on the applicant or licensee." § 45-124, R. R. S. 1943.

"Service shall be made in duplicate upon the Director of Banking, or, in his absence, upon the person in charge of his office, and shall be deemed sufficient service upon such licensee. No such service shall be valid or binding against such licensee when licensee is required thereunder to file answer, pleading or defense within less than ten days from the date of mailing the copy of such service to such licensee. When legal process against any such licensee is served upon the director, he shall forthwith, by registered mail, send one of the duplicate copies prepaid and directed to licensee." § 45-125, R. R. S. 1943.

The requirements of these statutes were followed.

Appellee suggests, in view of Article VII, section 5, of the Constitution of Nebraska, that appellant has no standing in court because any penalty arising thereunder must be paid to the common schools in the place where it accrues. We do not think this constitutional provision has application here. See, Graham v. Kibble, 9 Neb. 182, 2 N. W. 455; Clearwater Bank v. Kurkonski, 45 Neb. 1, 63 N. W. 133; Everson v. State, 66 Neb. 154, 92 N. W. 137; School Dist. of the City of Omaha v. Adams, 147 Neb. 1060, 26 N. W. 2d 24.

Appellee raises the question, is the appellant the real party in interest? We doubt if the appellee is in a position to raise this question for in its answer it alleged: "That Hastings Motor Truck Company as agent for this Defendant negotiated with the Plaintiff herein for the sale of said tractor and on June 24, 1954, sold the said tractor to the Plaintiff herein * * *. That subsequently on July 1, 1954, a certificate of title to the said tractor was issued in the name of the Plaintiff being title No. 39-45594 * * *." We said in Wright v. Lincoln City Lines, Inc., 160 Neb. 714, 71 N. W. 2d 182:

"A party may at any time invoke the language of the pleading of his adversary on which the case is tried on

a particular issue as rendering certain facts indisputable; and in so doing he is neither required nor permitted to offer the pleading in evidence.

"An admission made in a pleading on which the trial is had is more than an ordinary admission. It is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and is therefore a limitation of the issues."

We shall, however, for the purpose of discussing the facts relating thereto, consider this question.

Section 25-301, R. R. S. 1943, provides: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 25-304."

We have said of this section that: "The real party in interest is the person entitled to the avails of the suit." Gregory v. Pribbeno, 143 Neb. 379, 9 N. W. 2d 485. See, also, Dafoe v. Dafoe, 160 Neb. 145, 69 N. W. 2d 700; Uptegrove v. Metropolitan Life Ins. Co., 145 Neb. 51, 15 N. W. 2d 220; Kinsella v. Sharp, 47 Neb. 664, 66 N. W. 634.

Section 25-304, R. R. S. 1943, provides, insofar as here material, that: "* * * a person with whom or in whose name a contract is made for the benefit of another, * * * may bring an action without joining with him the person for whose benefit it is prosecuted."

We have said of this section: "A person with whom or in whose name a contract is made for the benefit of another may bring an action without joining with him the person for whose benefit it is prosecuted." Coe v. Nebraska Building & Investment Co., 110 Neb. 322, 193 N. W. 708. See, also, Stoll v. Sheldon, 13 Neb. 207, 13 N. W. 201.

It is true that Mrs. Kinney testified that Kinney had no interest in the trucks, nor in the trucking business he operated, except as manager thereof for W. W. Beckley of Cozad, Nebraska, who had state-wide authority to operate a trucking business. However, the purchase agreement entered into on June 23, 1954, with

H. M. T. Co. shows Burel Kinney to be the purchaser; the note for the balance of the indebtedness and the chattel mortgage on the truck given to secure this note are signed by Kinney as the owner of W. W. Beckley Trans. Co.; and the letter of H. M. T. Co. to the county clerk of Cheyenne County, dated June 25, 1954, advises him that Kinney would be in to purchase his new title for the truck he had purchased from it and to issue a new title to him. This was done, as requested, and a certificate of title was issued in the name of W. W. Beckley Transportation Co. In this situation the following has application: "* * * where the more favorable evidence relied on by a party to overcome the effect of his own self-injurious statement is in his own testimony, no distinction is drawn as compared with the situation where the curative evidence is from other witnesses. It is still for the trier of fact to decide the issue upon all the evidence." 169 A. L. R. 805. See, also, Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236. As therein stated: "A party is entitled to the benefit of the testimony of other witnesses in contradiction of his own, wherever his own is not of the character of a judicial admission, and concerns only some evidential or constituent circumstance of his case."

We have come to the conclusion that the evidence establishes that Kinney became the owner of the truck purchased and, as such, the real party in interest. We do not think, based on the evidence adduced, that W. W. Beckley was personally liable for the indebtedness herein involved. But even if it can be said the contract entered into was for the benefit of W. W. Beckley, which we do not find to be the fact, the action could still be maintained by Kinney under the provisions of section 25-304, R. R. S. 1943.

Appellee raises the question, can an equitable action be maintained to enforce a penalty or forfeiture? It is true that courts of equity generally refuse to aid in the enforcement of penalties and forfeitures and leave the

parties to whatever remedies they may have at law. See 30 C. J. S., Equity, § 57, p. 398.

We have held this to be true when the provisions of a statute that are being sought to be enforced do not so provide. Davis v. Atlanta Finance Co., 160 Ga. 784, 129 S. E. 51. As well as where they do. Meredith v. Lyon & Healy, 3 Neb. (Unoff.) 485, 92 N. W. 122. However, this is not an absolute or inflexible rule and should yield when good reason exists for doing so. See 30 C. J. S., Equity, § 57, p. 398.

Public policy, as it relates to the effect of any violation of statutes dealing with installment loans by those engaging in the making thereof, has been fixed by the Legislature and not the courts. The Legislature, in this respect, has provided that: "Any contract of loan made in violation of this section, either knowingly or without the exercise of due care to prevent the same, shall be void and the licensee shall have no right to collect or receive any principal, interest, or charges on such loan." § 45-138, R. S. Supp., 1953.

"Any person, firm, partnership, corporation or association, or officer or employee thereof, violating any of the provisions of sections 45-138 to 45-145, shall be deemed guilty of a misdemeanor, * * *." § 45-153, R. R. S. 1943.

"Any contract of loan, in the making or collection of which any act is done which constitutes a misdemeanor under section 45-153, shall be void and the lender shall have no right to collect or receive any principal, interest or charges whatsoever." § 45-154, R. R. S. 1943.

"Violation of sections 45-114 to 45-155 in connection with any indebtedness, however acquired, shall render such indebtedness void and uncollectible." § 45-155, R. R. S. 1943.

These provisions apply to any person making such a loan, whether licensed or not. Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122; State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215.

As stated in State ex rel. Beck v. Associates Discount Corp., *supra:* "Their purpose and design is to license and control the business of making such installment loans, and to restrict the enforcement and collection of illegal installment loans once they have been made by either licensees or nonlicensees, an all-inclusive and proper classification. Thus, the inhibitory provisions thereof include and apply to all lenders of installment loans, whether they be licensees or nonlicensees."

We see no reason why a court of equity should not lend its aid to help carry out this declaration of public policy by the Legislature. In fact, we think it should. Some of the reasons for doing so are well stated in State ex rel. Beck v. Associates Discount Corp., *supra,* as follows: "To declare such contracts void and uncollectible without cancellation thereof, or, more appropriately, without enjoining their collection, would permit defendants to subsequently use them only for purposes of unlawful harrassment and extortion, which this action sought to enjoin. Equity is not so helpless. Equity will always strive to do complete justice. To declare such contracts void and uncollectible and enjoin their collection if they are void and uncollectible, is but a necessary incident to the primary purpose of this action * * *." We recognize the action therein brought was authorized by section 45-157, R. R. S. 1943, but we see no reason why equity should not provide the same measure of relief for individual borrowers. See, also, Rosenblum v. Family Finance Corp., 179 Misc. 1050, 39 N. Y. S. 2d 230; Powell v. Edwards, *supra.* We recognize there are authorities holding to the contrary. See Goodwin Co. v. National Discount Corp., 5 Wash. 2d 521, 105 P. 2d 805, 135 A. L. R. 801. But our holding herein should not be construed to be in conflict with holdings denying such relief where a conspiracy existed between the borrower and lender to evade the law as was the situation in Ryan v. Motor Credit Co., 132 N. J. Eq. 398, 28 A.

2d 181, 142 A. L. R. 640, and Mills v. First State Pawners Society, 192 Ill. App. 231. Nor does this holding conflict with our own decisions, such as Eiseman v. Gallagher, 24 Neb. 79, 37 N. W. 941, and Bolen v. Wright, 89 Neb. 116, 131 N. W. 185, wherein section 45-105, R. R. S. 1943, was involved, for that statute does not make the contract void when a usurious rate of interest is being charged.

Appellee seeks to invoke the doctrine that he who comes into equity seeking relief must come with clean hands, suggesting that no court should lend its aid to a man who bases his cause upon an illegal act. It is true that in Grand Island Finance Co. v. Fowler, 124 Neb. 514, 247 N. W. 429, we said: "If the transaction was a loan for usury, as asserted by defendant, instead of a sale on time, the contracting parties entered into an unlawful agreement. Viewed in that light both participated in the lawlessness." However, since then we held in State ex rel. Beck v. Associates Discount Corp., *supra,* that: "Further, all of such borrowers are regarded not as in pari delicto but as in viniculus (sic) to defendants, to whom they owe no duty in equity. See, Davis v. Atlantic Finance Co., 160 Ga. 784, 129 S. E. 51; Cuneo v. Bornstein, 269 Mass. 232, 168 N. E. 810; Horner v. Nitsch, 103 Md. 498, 63 A. 1052; Goble v. O'Connor, 43 Neb. 49, 61 N. W. 131." See, also, Chakford v. Sturm (Fla.), 65 So. 2d 864; Milo Theater Corp. v. National Theater Supply, 71 Idaho 435, 233 P. 2d 425. In view of our more recent holding we find the language used in Grand Island Finance Co. v. Fowler, *supra,* does not correctly reflect the relationship of the parties. In view of the foregoing we do not find the principle here sought to be invoked has any application.

Appellee suggests that Kinney was buying this truck in order to use it in his own business under a certificate of state-wide authority issued to W. W. Beckley, thus violating the Motor Carriers Act, and that, under such a situation, he should have no standing in a court of equity. Assuming what appellee suggests is correct,

we do not think that fact has any relationship to the matter herein involved. Whether or not the contract entered into by the parties left the balance of the purchase price of the truck in the form of a loan or in the form of a deferred time purchase price has no relationship to the purpose for which the truck was intended to be used.

Should Kinney have tendered a return of the truck or the sum of $10,000 in order to be entitled to the relief he seeks? We think not. The statute does not so provide, in fact, it prohibits the collection or receiving of anything on such a loan and consequently the borrower owes no duty in equity to the lender. See, Cuneo v. Bornstein, 269 Mass. 232, 168 N. E. 810; Davis v. Atlanta Finance Co., *supra;* Nash Loan Co. v. Dixon, 181 Ga. 297, 182 S. E. 23. As stated in Nash Loan Co. v. Dixon, *supra*: "* * * the act of 1920 prohibits the collection of any part of the principal or interest, and consequently the borrower owes 'no duty in equity to the lender.'" In view of the relationship of the parties we think the foregoing is correct.

The principle here involved has been stated by this court many times since Grand Island Finance Co. v. Fowler, *supra.* The most recent case is State ex rel. Beck v. Associates Discount Corp., *supra.* In Powell v. Edwards, *supra,* we stated it as follows: "* * * an automobile dealer may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan. * * * a time sale made in good faith at a price in excess of a cash price, even though the difference exceeds lawful interest for a loan, which price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not be regarded as being tainted with usury." However, as also stated in Powell v. Edwards, *supra*: "These rules however do not apply where it is proved that the

transaction was not made in good faith but that it was a scheme and a device pursued to evade the operation against it of the usury statute." In State ex rel. Beck v. Associates Discount Corp., *supra,* we said: "In such cases, however, the transaction between the buyer and seller must be a completed bona fide time price sale agreement." In order to have the foregoing principles apply it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash sale price. It is not enough to merely show that the instruments signed evidencing the indebtedness refer to a time price or time differential when, in fact, the buyer was never quoted a time sale price as such.

The burden of proof to show the nature of the transaction is on the appellant, since he claims it was a loan. The action being one in equity we will consider the record de novo and, in considering it, apply the usual principles applicable in such cases. In cases of this character courts will look through the form to the substance of the transaction in order to determine whether there was a bona fide time sale or a loan. See, State ex rel. Beck v. Associates Discount Corp., *supra;* General Motors Acceptance Corp. v. Weinrich, 218 Mo. App. 68, 262 S. W. 425. The statutes make no requirement that a borrower, in order to come within the provisions thereof, must be a necessitous one. In fact, the statutes relating to installment loans have no requirements of any kind in that respect and, in view of that fact, we would not be justified in so limiting the application thereof.

The evidence shows that on October 5, 1953, H. M. T. Co. sold to Wayne Crouch of Otis, Colorado, a 1953 5-ton Diamond T tractor, taking a lien thereon for $14,580 as a part of the purchase price; that appellee purchased this lien, H. M. T. Co. guaranteeing the payment thereof; that on June 18, 1954, because he was unable to meet the payments due, Crouch voluntarily turned the truck over to appellee, there being at that time unpaid on the

lien obligation slightly over $12,765; that at the time of the repossession H. M. T. Co. had a second lien on the truck in the sum of $1,059.96 which was unpaid; that the title to the truck was placed in the name of H. M. T. Co. for the purpose of sale, both it and appellee being interested therein; that H. M. T. Co. did not at that time pay appellee the amount of the lien it had guaranteed; that appellee authorized and directed H. M. T. Co. to sell the truck for its benefit; that on June 23, 1954, H. M. T. Co. did sell the truck to Kinney, taking from him in consideration therefor a 1952 International truck and an $11,200 note and chattel mortgage; that appellee accepted the note in part payment of the amount owing on the Crouch obligation, H. M. T. Co. paying the balance pursuant to its guarantee; that H. M. T. Co. guaranteed the Kinney note; and that appellee has kept the $11,200 note and received eight installment payments thereon.

The record shows the negotiations leading up to the sale of the truck took place in Kinney's place of business near Sidney, Nebraska, on June 23, 1954, in the presence of Mrs. Kinney. Mrs. Kinney testified Kinney bought the truck from Sahling for $13,500; that he gave in payment thereof a 1952 International tractor at an agreed value of $3,500 and $10,000; that Kinney advised Sahling he would have to borrow the $10,000 some place; and that Sahling advised Kinney they could take care of that as appellee would loan him that amount. Sahling, on the other hand, testified he and Kinney talked about a cash price and a different price if he wanted time in which to pay; that he told Kinney the price would be more if he wanted time to pay a part thereof; and that they agreed upon an amount which would give Kinney 18 months in which to pay. Since these two witnesses, who were present at the time, cannot agree upon what basis the obligation of $11,200, payable in 18 installments, was created we must turn to the other evidence adduced to assist us in finding out who is testi-

fying to the correct version. In this respect the purchase agreement, as filled in by Sahling, clearly evidences just what the original agreement entered into was. It shows the "Total Price" of the used truck purchased by Kinney as "$13,500.00"; that Kinney was given an "Allowance for Used 1952-L-200 International Truck" of "3500.00"; and that the "Total Price Difference" was "$10,000.00."

In respect thereto the agreement provides: "Purchaser agrees to terms of sale written herein * * *."

Sahling also filled in as part of this purchase agreement the following: "To be Financed 18 months - $10,000.00 Finance Charges - $1200.00 Insurance to be furnished by Customer Loss Payable Clause to General Credit Corporation, Hastings Nebr." In this respect the purchase contract provides: "There are no promises, verbal understandings, or agreements of any kind, pertaining to this contract other than specified herein."

Even the "Dealer's Work Sheet and Agreement," which Sahling testified he filled out with pen prior to Kinney signing the "purchasers Statement and Application for Credit," which is a part thereof, and before Mrs. Kinney signed the financial "Balance Sheet" of "Burel F. Kinney," contained no figure in respect to "Plus Increase in Time Price over Cash Price" although a figure of $1,200 was later put in in pencil.

Considering all of the evidence adduced, particularly the documents Sahling filled in and then had Kinney execute at the time the contract for the sale of the used truck was entered into, we can come to no other conclusion than that the sale of the used truck was made for $13,500, subject to a trade-in for $3,500, thus leaving a balance of $10,000 which was to be paid in cash and that Sahling agreed the people he represented would make Kinney a loan for that amount, and did, for a charge of $1,200. Section 45-138, R. S. Supp., 1953, provides in that respect that: "No licensee shall directly or indirectly charge, contract for, or receive a greater

rate of interest than nine per cent per annum upon any loan, or upon any part or all of any aggregate indebtedness of the same person, in excess of one thousand dollars." The charge of $1,200 made for an installment loan of $10,000 payable in 18 monthly installments is far in excess of the maximum authorized by section 45-138, R. S. Supp., 1953, and, because of that fact, is in violation thereof and consequently subject to the penalties imposed by the statutes, which have hereinbefore been set forth.

Appellee admits H. M. T. Co. was its agent for the purpose of selling the truck but claims such agency was subject to the general rule quoted in 2 C. J. S., Agency, § 114, p. 1322, as follows: "Ordinarily * * * an agent * * * may sell only for cash * * * and cannot assent in behalf of his principal to receiving payment in bonds, notes, or similar paper." It also claims that the general rule stated in 2 C. J. S., Agency, § 42b and c, pp. 1083, 1085, is here applicable. It is as follows: "The rule that the principal must have full knowledge of the facts has been applied among other types of actions noted herein both to unauthorized contracts and to tortious acts of agents. * * * he cannot ordinarily be deemed to have ratified the whole unauthorized act of his agent where the knowledge of such principal is partial or imperfect." We do not think the facts justify the application of either of these principles. The evidence shows appellee had repossessed the truck on which it had a very substantial defaulted lien; that H. M. T. Co. was also interested therein because of a second lien thereon but primarily because it had guaranteed to appellee the payment of the first lien; that the truck was taken in the name of the H. M. T. Co. to facilitate its sale in order to satisfy these unpaid liens, H. M. T. Co. not having paid appellee; that the sales of trucks are not usually on a cash basis but at least part of the purchase price is financed; that Sahling was acting as agent for both appellee and H. M. T. Co. in selling the

truck; and that appellee accepted the proceeds of the sale in part payment of the debt from Crouch, H. M. T. Co. making good the balance.

"Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority." Holt v. Schneider, 57 Neb. 523, 77 N. W. 1086.

"Whether or not an act is within the scope of an agent's apparent authority is to be determined under the foregoing rule as a question of fact from all the circumstances of the transaction and the business." Holt v. Schneider, *supra*.

Under the situation here presented we think Sahling, while acting as agent for both parties, had general authority to make a sale of the truck to the best advantage of both parties and, in doing so, was authorized to make whatever financial arrangements were necessary to finance the purchase price, or any part thereof. Further, as stated in Johnston v. Milwaukee & Wyoming Investment Co., 49 Neb. 68, 68 N. W. 383: "If the principal desires to repudiate the unauthorized act of his agent, he must, as soon as he acquires knowledge of the facts, return, or tender a return, of any benefits by him received as the proceeds of such acts, or be held to have ratified them." And therein we went on to say: "* * * that plaintiff should return the amount so used for its benefit, or tender a return of it, if it desired to repudiate the whole of the act of the agent when he sold the cattle to defendants as unauthorized, and this whether the discovery was made before or after commencement of the action to recover the cattle."

And, as stated in Tylee v. Illinois C. R. R. Co., 97 Neb. 646, 150 N. W. 1015: "A principal who accepts the

benefits of a contract executed in his behalf by an agent is chargeable with the instrumentalities employed by the latter in procuring it."

Under all of the facts disclosed by the record we find Sahling, as agent for appellee, acted within the scope of this authority in advising Kinney that the owners of the truck would finance for him the unpaid balance of the purchase price in the sum of $10,000 and, when he made a charge of $1,200 for doing so and they accepted the benefits thereof, they are now bound by his action and must bear the responsibility for his conduct.

The note herein given in the sum of $11,200 was void from its inception and neither the principal nor interest was collectible and the appellant was and is entitled to have it canceled. But is that the limit of the relief appellant is entitled to? As we have often said: "It is the practice of courts of equity, when they once have obtained jurisdiction of a case, to administer all the relief which the nature of the case and the facts demand, and to bring such relief down to the close of the litigation between the parties." Herrin v. Johnson Cashway Lumber Co., 153 Neb. 693, 46 N. W. 2d 111. See, also, Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131.

The evidence shows Kinney paid eight monthly installments of either $622.26 or $622.22 before instituting this action. The statutes, which have been hereinbefore quoted, not only provide that a loan made in violation of the installment loan statutes shall be void and uncollectible but further provide that the lender is is not entitled to "receive any principal, interest, or charges on such loan." See § 45-138, R. S. Supp., 1953. In view of this language we think the Legislature intended a lender should have nothing in such a situation. We therefore come to the conclusion that the appellee must return the payments which it received on this void loan. See, Rosenblum v. Family Finance Corp., *supra;* Chakford v. Sturm, *supra.* As stated in Rosenblum v. Family Finance Corp., *supra,* under statutes

comparable to ours: "A violation thereof, as indicated, renders the transaction void. Such being the case, the lender may not retain any benefits which it has received thereunder. Nor may it even seek to be placed in statu quo, for it is expressly forbidden, where at fault, 'to collect or receive any principal, interest or charges whatsoever' (sec. 358, supra)."

Having come to the conclusion that the trial court was in error in rendering the decree that it did dismissing appellant's action we reverse its judgment doing so with directions that it render a judgment as follows: First, that it cancel the installment note of June 23, 1954, from W. W. Beckley Trans. Co. by Burel Kinney owner to appellee in the total sum of $11,200; second, that it order the clerk of the district court to pay to appellant the sum of $6,222.24 deposited with him, pursuant to stipulation of the parties, to cover the last ten installments due on the above note; third, that it render a judgment against the appellee for the full amount of the eight payments made to it in the total sum of $4,977.96 plus interest at 6 percent on the amount of each payment from the date it was made; and fourth, that all costs be taxed to appellee.

REVERSED AND REMANDED WITH DIRECTIONS.

J. HAMMOND MCNISH, ADMINISTRATOR OF THE ESTATE OF BUREL KINNEY, DECEASED, APPELLANT, V. GRAND ISLAND FINANCE COMPANY, APPELLEE.

83 N. W. 2d 13

Filed May 3, 1957. No. 34126.

Usury. A time sale made in good faith at a price in excess of a cash price, which time price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not necessarily be regarded as being tainted with usury even though the difference exceeds the lawful rate of interest for a loan.

APPEAL from the district court for Cheyenne County: JOHN H. KUNS, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Ewald D. Warnsholz and *J. Max Harding,* for appellant.

Harold A. Prince, Walter P. Lauritsen, Conway & Irons, and *Martin, Davis & Mattoon,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for Cheyenne County. Therein, on February 3, 1955, Burel Kinney brought suit, consisting of two causes of action, against the Grand Island Finance Company. The purpose of the first cause of action, as set forth in plaintiff's amended petition filed on April 2, 1955, on which the action was tried, is to have declared null and void an alleged installment loan in the principal sum of $11,246.40, made by defendant to plaintiff, because the interest charge of $1,349.57 made for the use thereof is in violation of the maximum amount authorized by the provisions of section 45-138, R. S. Supp., 1953, which statute deals with "Installment Loans" of over $1,000. The purpose of the second cause of action, as set forth in the same amended petition, is to have declared null and void an alleged installment loan in the principal sum of $7,000, made by defendant to plaintiff, because the interest charge of $840 made for the use thereof is in violation of the maximum amount authorized by the provisions of section 45-138, R. S. Supp., 1953, which deals with "Installment Loans" of over $1,000. The relief asked in both causes of action is that the promissory note evidencing the indebtedness in each case be held null and void and that the defendant be required to refund to plaintiff all payments it has received thereon from plaintiff. The primary defense pleaded in each cause of action is that the indebtedness owing from plaintiff to

defendant is not a loan but the balance due on the time purchase price plaintiff agreed to pay for a truck and therefore not subject to the provisions of the foregoing statute.

Plaintiff was accidently killed on January 16, 1956, and the action was thereafter, on February 28, 1956, revived in the name of J. Hammond McNish as administrator of his estate. We shall hereinafter refer to decedent as Kinney.

The trial court found for the defendant and dismissed both of plaintiff's causes of action. Plaintiff thereupon filed a motion for new trial and this appeal is taken from the overruling thereof.

By stipulation of the parties, entered into at the time of trial, the evidence introduced was to be considered by the trial court in both this case and in McNish v. General Credit Corp., *ante* p. 526, 83 N. W. 2d 1. In this court the two cases were consolidated for the purpose of briefing and oral argument. Most of the questions raised are common to both cases and have been answered by our opinion in McNish v. General Credit Corp., *supra*. In view thereof we will not repeat that discussion herein except as a discussion of the facts in either cause of action herein make such reference necessary.

Kinney had, since November 25, 1951, been engaged in the trucking business with headquarters near Sidney in Cheyenne County, Nebraska. Appellee is a copartnership consisting of Edgar Reynolds and Frances Reynolds. Its principal place of business is in Grand Island, Nebraska, where, at all times herein material, it was licensed to and operating a small loan business at 115 West Second Street. The Hastings Motor Truck Company, a Nebraska corporation, was, at all times herein material, engaged in the selling and servicing of trucks with its principal place of business located in Hastings, Nebraska. Clinton J. Sahling, hereinafter referred to as Sahling, was a stockholder, the vice-presi-

dent, and a salesman of this corporation, which we will hereinafter refer to as H. M. T. Co.,

Is the appellant the real party in interest as to his first cause of action? In respect thereto appellee pleaded: "* * * plaintiff, operating under the name of W. W. Beckley, bought said Diamond T. truck from the said Hastings Motor Truck Company; that the said Hastings Motor Company issued to the plaintiff, operating as W. W. Beckley, a transfer of said Manufacturer's Certificate and that a certificate of title to said W. W. Beckley was issued by the County Clerk of Cheyenne County, being No. 39-46753, * * * plaintiff became the owner of said truck; * * *." Under our holding in Wright v. Lincoln City Lines, Inc., 160 Neb. 714, 71 N. W. 2d 182, set forth with approval in McNish v. General Credit Corp., *supra,* we do not think that question can now be raised. The same is true as to appellant's second cause of action for in the answer thereto appellee alleged: "* * * Hastings Motor Truck Company sold said truck to the plaintiff, doing business as W. W. Beckley Trans. Co., * * * Hastings Motor Truck Company sold and delivered said truck to the plaintiff * * *."

As to the second cause of action there is a further factual reason why this contention has no merit. It is true that Mrs. Kinney testified that Kinney had no interest in the trucks, nor in the trucking business he operated, except as manager thereof for W. W. Beckley of Cozad, Nebraska, who had state-wide authority to operate a trucking business. However, the purchase agreement entered into on June 23, 1954, with H. M. T. Co. shows Burel Kinney to be the purchaser; the note for the balance of the indebtedness and the chattel mortgage on the truck given to secure the same are both signed by Kinney as the owner of W. W. Beckley Trans. Co.; the letter from appellee to the clerk of Cheyenne County dated June 25, 1954, advised him the certificate of title covering the truck sold was enclosed "assigned to Burel F. Kinney" and advised him that Kinney would

call to make application therefor and to issue a new title to him; and the "Transmittal Statement" of June 23, 1954, from H. M. T. Co. to appellee shows the purchaser to be Burel F. Kinney. In this situation we think the principles announced in McNish v. General Credit Corp., *supra,* are applicable. In view thereof we come to the conclusion that the evidence establishes that Kinney became the owner of the used truck purchased and, as such, the real party in interest. But even if it can be said that the contract entered into was for the benefit of W. W. Beckley, which we do not find to be the fact, the action could still be maintained by Kinney under the provisions of section 25-304, R. R. S. 1943.

The indebtedness involved in the first cause of action resulted from the sale of a new 1954 Diamond T 7½-ton truck while the indebtedness involved in the second cause of action resulted from the sale of a used 1953 Diamond T 5-ton tractor truck. The principal question to be determined in each case is whether or not the contract was in fact a sale on time, with payments deferred, or one for cash, with a loan being made to pay the balance of the purchase price.

Joe Barger, a salesman for H. M. T. Co., handled the sale of the new truck to Kinney as a result of a telephone call from Kinney, Kinney called H. M. T. Co. by telephone advising Barger, with whom he talked, that he wanted to buy a new tandem axle tractor and that he would like to trade in a 1953 New Moon house trailer thereon at a figure of $6,000. Kinney was apparently quoted a price of $17,246.40 for a new 1954 Diamond T 7½-ton truck of the kind he wanted and offered a trade-in of $6,000 for his house trailer, thus leaving a balance of $11,246.40. Kinney advised Barger he wanted time in which to pay the balance of the purchase price and he and Barger then agreed on 24 months for that purpose. Everett Blackburn, president of H. M. T. Co., then figured out for Barger what the payments would be if Kinney wanted 24 months to pay the bal-

ance of the purchase price, that is, $12,595.97 payable in 23 monthly payments of $524.83 and one of $524.88. Barger then advised Kinney by telephone of the amount it would take to buy the truck if he wanted 24 months in which to pay. Apparently Kinney agreed thereto for the papers were accordingly prepared and taken to Sidney where Kinney signed them on August 18, 1954. We think the record shows that Kinney was informed of what the balance of the cost of the truck would be if he wanted 24 months for the purpose of paying it. We think the agreement entered into between Kinney and H. M. T. Co. resulted in a bona fide time price sale agreement.

It is true that when H. M. T. Co. sold this paper to appellee on the following day that appellee discounted it $1,349.57 and remitted to H. M. T. Co. the sum of $11,246.40, being the exact amount of the balance if Kinney had made a cash purchase. However, as we have often said: "* * * a time sale made in good faith at a price in excess of a cash price, even though the difference exceeds lawful interest for a loan, which price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not be regarded as being tainted with usury." Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122. Consequently the other provisions of the statutes relating to installment loans, which are cited by appellant, have no relationship to this paper.

We turn now to the factual background of the appellant's second cause of action. On June 22, 1954, in response to a telephone call from Kinney on June 21, 1954, Sahling went to Sidney where, on June 23, 1954, he met Kinney and, in the presence of Mrs. Kinney, negotiated the sale to him of two used trucks, the sale of one of which is the basis of the second cause of action herein.

The evidence shows that appellee had repossessed a 1953 Diamond T tractor truck which had previously

been sold by H. M. T. Co. to Raymond Bailey of Kansas City, Missouri; that at the time it was repossessed there was owing to appellee over $10,000 on the lien it held thereon, which indebtedness was guaranteed by H. M. T. Co.; that appellee took a certificate of title thereto in its name but gave H. M. T. Co. possession thereof and directed it to sell the truck; that H. M. T. Co. had a second lien thereon of $707 at the time it was repossessed by appellee; that on June 23, 1954, Sahling, for H. M. T. Co., sold the truck to Kinney, taking from him in consideration therefor a used 1951 Ford F-8 tractor truck and a $7,840 note and chattel mortgage; that appellee accepted the note and applied $7,000 in payment of the balance owing it of $6,806.75 and remitting to H. M. T. Co. the sum of $193.25, H. M. T. Co. in the meantime having paid appellee over $3,000 on the indebtedness pursuant to its guarantee thereof; that H. M. T. Co. guaranteed the Kinney note; and that appellee has kept the $7,840 note and received eight installment payments thereon each in the sum of $435.65 or $435.55 for a total of $3,485.10.

The record shows the negotiations leading up to the sale of the truck were had in Kinney's place of business near Sidney, Nebraska, on June 23, 1954, in the presence of Mrs. Kinney. Mrs. Kinney testified Kinney bought the truck from Sahling for $9,500; that he gave in part payment thereof a used 1951 Ford tractor at an agreed value of $2,500 and $7,000; that Kinney advised Sahling he would have to borrow the $7,000 some place; and that Sahling advised Kinney they could take care of that as appellee would loan him that amount. Sahling, on the other hand, testified he and Kinney talked about a cash price and a different price if he wanted time in which to pay the balance; that he told Kinney the price would be more if he wanted time to pay a part thereof; and that he and Kinney agreed upon the amount that would give Kinney 18 months in which to pay. Since these two witnesses, both of whom were present at the

time, cannot agree upon what basis the obligation of $7,840 payable in 18 installments was created we must turn to the other evidence adduced to assist us in finding out who is testifying to the correct version. In this respect the purchase agreement, as filled in by Sahling, evidences just what the original agreement entered into was. It shows the "Total Price" of the used truck purchased by Kinney as "9500.00"; that Kinney was given an "Allowance for Used 1951 F-8 tractor" of "2500.00"; and that the "Total Price Difference" was "$7000.00." In this respect the agreement entered into provides: "Purchaser agrees to terms of sale written herein * * *."

Sahling also filled in as part of this purchase agreement the following: "$7000.00 Financed 18 months $740.00 Interest Charges Loss Payable Clause to Grand Island Finance Co Grand Island Nebr." In this respect the purchase agreement provides: "There are no promises, verbal understandings, or agreements of any kind, pertaining to this contract other than specified herein." We think the language written in by Sahling reflects the agreement entered into although the interest charge, as shown by the note, was increased to $840.

Considering all of the evidence adduced, particularly the purchase agreement which Sahling filled in and then had Kinney execute at the time the contract for the sale of the used truck was entered into, we can come to no other conclusion than that the sale of the used truck was made for $9,500, subject to a trade-in for $2,500, thus leaving a balance of $7,000 which was to be paid in cash and that Sahling agreed the people he represented would make Kinney a loan for that amount, and did, for a charge of $840. The charge thus made for an installment loan of $7,000 payable in 18 monthly installments is far in excess of the maximum authorized by section 45-138, R. S. Supp., 1953, and, because of that fact, is in violation thereof and subject to the penalties imposed thereby.

Appellee admits it turned the truck over to H. M. T. Co. for sale and authorized it to sell it for appellee's benefit, and thus help liquidate the Bailey loan, but claims H. M. T. Co.'s salesman did not have authority to make a loan in its behalf. Under the situation here presented we think Sahling, while acting as agent for appellee, had general authority to make a sale of the truck to the best advantage possible for both parties and, in doing so, was authorized to make whatever financial arrangements were necessary to finance the purchase price, or any part thereof. We think Sahling acted within the scope of his authority in making the loan. Not only did appellee accept the fruits of what Sahling did, and receive payment thereunder, but it still possesses the note he secured for them and has never offered to return it. In view of the authorities cited in McNish v. General Credit Corp., *supra*, we find appellee is now bound by Sahling's actions in securing it and must bear the responsibility therefor.

The note herein given in the sum of $7,840 was void from its inception and neither the principal nor interest was collectible and appellant was and is entitled to have it canceled together with a return of all payments which have been made to appellee pursuant thereto.

Having come to the conclusion that the trial court was correct in dismissing appellant's first cause of action we affirm its judgment doing so with directions that all money paid to the clerk of the district court pursuant to the terms of the $12,595.97 note be turned over to the appellee. However, we are of the opinion that the trial court was in error in dismissing appellant's second cause of action and therefore reverse its judgment doing so and remand that cause back to the district court with directions to render a judgment therein in favor of the appellant as follows: First, that it cancel the installment note of June 23, 1954, from W. W. Beckley Trans. Co. by Burel Kinney owner to appellee in the total sum of $7,840; second, that it order the clerk

of the district court to pay to appellant the sum of $4,354.90 deposited with him pursuant to stipulation of the parties to cover the last ten installments due on the foregoing note; third, that it render a judgment against the appellee for the full amount of the eight payments made to it in the total sum of $3,485.10 plus interest at 6 percent on the amount of each payment from the date it was made; and fourth, that it tax all costs to appellee.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

ALLEN L. MCGREE, APPELLANT, V. STANTON-PILGER DRAINAGE DISTRICT, APPELLEE.
82 N. W. 2d 798

Filed May 3, 1957. No. 34168.

1. **Eminent Domain.** Where in a condemnation proceeding a right-of-way was taken pursuant to a plat in the plans and specifications of the project, and the same was surveyed, staked, and flagged on the ground in accordance therewith when the condemnation was commenced, an error in the metes and bounds description may be corrected by the district court to conform thereto when the location of the right-of-way is questioned.
2. **Drains.** A drainage district organized under Chapter 31, article 4, R. R. S. 1943, has no duty to maintain and repair its works unless the plans and specifications of the project specifically provide therefor.
3. ———. A drainage district organized under Chapter 31, article 4, R. R. S. 1943, is liable for damages caused by the negligent construction of its works.
4. **Eminent Domain: Judgments.** The judgment of the district court on appeal from an award in a condemnation proceeding for a right-of-way is conclusive upon the parties thereto as to all matters actually litigated, and also as to all matters necessarily within the issues whether formally presented or not.
5. ———: ———. In the trial of a condemnation proceeding the owner of property taken or damaged is entitled to have all proper elements of damage considered by the jury, and he cannot afterwards maintain an action to recover for damages omitted

which were necessarily involved in the condemnation proceeding.

6. **Constitutional Law: Eminent Domain.** When land is taken outside the boundaries of the right-of-way condemned, it constitutes a second taking of private property for a public use and liability attaches therefor under Article I, section 21, of the Constitution.

7. ———: ———. In an action for damages based upon Article I, section 21, of the Constitution, against a drainage district organized under the provisions of Chapter 31, article 4, R. R. S. 1943, for the taking or damaging of private property for a public use, it is not necessary for plaintiff to plead or prove that he filed a notice as provided by section 31-451, R. R. S. 1943.

APPEAL from the district court for Cuming County: FAY H. POLLOCK, JUDGE. *Reversed and remanded with directions.*

Bernard A. Ptak, for appellant.

Thomas L. Grady, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

The plaintiff brought this action against the Stanton-Pilger Drainage District for damages to his real estate caused by erosion of the banks of the Elkhorn River, and for other lands actually taken and not paid for by the district. The district filed a cross-petition asserting a mistake in the metes and bounds description of the right-of-way procured by condemnation proceedings and prayed that the description be corrected to conform to the lands actually taken. A jury was waived and a trial had to the court. The trial court found for the district on plaintiff's cause of action and for the district on its cross-petition. From the judgment rendered in accordance with these findings the plaintiff has appealed.

The plaintiff is the owner of the south 120 acres of the Northeast Quarter of Section 6, Township 23 North, Range 4 East of the 6th P. M., in Cuming County, Nebraska. The lands involved in this action lie within a large horseshoe bend of the Elkhorn River. The river

in this area is a very crooked stream and has frequently changed its channel at various places by erosion. The district, some time prior to May 27, 1950, determined to construct a pilot channel across the south end of plaintiff's lands and thereby straighten the course of the river. After failing in its attempts to negotiate a right-of-way across plaintiff's lands, it proceeded by condemnation to obtain one. It sought a right-of-way 200 feet in width in the center of which it proposed to construct a pilot channel 24 feet wide at the bottom and 34 feet wide across the top into which the river was to be diverted. The plat describing the land to be taken showed that the pilot channel would enter plaintiff's lands on the west. The center of the right-of-way was to be 790.5 feet north of the southwest corner of plaintiff's lands. The right-of-way was surveyed, staked, and flagged on the ground at the time of the appraisal and at the time of the trial in the district court in accordance with this figure. The record shows, however, that in describing the right-of-way by metes and bounds on the original plat and in the appraisers' award from which the appeal was taken, due to an evident transposition of figures the distance was shown as 709.5 feet instead of 790.5 feet.

It is clear from the record that the right-of-way was correctly marked out on the ground by stakes and flags when the appraisers viewed the premises and when the case was tried in the district court. The misdescription did not prejudice the rights of the plaintiff. The trial court was in all respects correct in reforming the description to conform to the plat and the survey made on the ground. See Holst v. Streitz, 16 Neb. 249, 20 N. W. 307. The contention of the plaintiff that he is entitled to be paid for land actually taken which was not within the right-of-way based on the distance of 709.5 feet from the southwest corner of plaintiff's land to the center of the right-of-way to the north where it entered plaintiff's lands is without merit. The trial

court found that the description contained in the appraisers' award in the condemnation case should be corrected and reformed to read as follows: A strip of land 200 feet wide across the south half of the northeast quarter of Section 6, Township 23 North, Range 4 East of the 6th P. M., in Cuming County, Nebraska. The center line of said strip of land is more particularly described as follows: Commencing at a point 790.5 feet north of the southwest corner of said quarter section as the point of beginning; thence south 73° 36′ east 487.9 feet; thence southeasterly 2,095.9 feet along a 14,324.9 feet radius curve concave northeasterly and tangent to the preceding course, to a point 192.9 feet north of the southeast corner of said quarter section as the point of ending.

The foregoing is the description of the right-of-way actually taken, and constituted the basis on which damages were assessed. The trial court correctly reformed the appraisers' description of the right-of-way to conform to the facts. No pleadings were filed in the district court in the original condemnation proceeding and no description of the right-of-way was set out in the district court judgment. This necessitates the correction of the error in the description contained in the appraisers' award to make it conform to the facts. The authority of the court to reform such an instrument is supported by Beall v. Martin, 48 Neb. 479, 67 N. W. 433; 31 Am. Jur., Judgments, § 639, p. 220; 49 C. J. S., Judgments, § 237, p. 449. The trial court correctly granted the prayer of the cross-petition.

It is clear that plaintiff was paid for all the land within the right-of-way described above. His claim for 5.493 acres of such land so taken, which was outside of a right-of-way based on the distance of 709.5 feet from the southeast corner of his lands to the center of the right-of-way at the point where it entered his lands, was properly denied by the trial court.

The plaintiff seeks to recover for lands taken by the

erosion of the river outside the boundaries of the right-of-way as he contended them to be, and some of which eroded land was outside of the right-of-way as we have found it to be. The district asserts that this was damage contemplated by and fully settled by the condemnation proceeding.

As we have heretofore stated, plaintiff's land lies in a bend of the river. Where the pilot channel was constructed there had been no previous river channel. The plaintiff refused to grant a right-of-way because he was familiar with the tendency of the river to erode and change its course, and he was fearful that it could or would not be contained within the 200-foot right-of-way. The president of the drainage district testified that this tendency of the Elkhorn River was well known and that it was not contemplated that the river would be contained within the banks of the pilot channel. It was contemplated, as he testified, that the river would erode and adjust its course as the full volume of the stream gradually assumed the new course charted by the pilot channel. It is for this reason that a right-of-way of 200 feet was sought and obtained. The pilot channel was 34 feet wide at the top with 83 feet of land on each side within the right-of-way. The river could therefore erode and change its course for 83 feet in either direction from the established banks of the pilot channel without injuring the lands of the plaintiff.

It is the contention of the plaintiff that when the river by erosive action changed its course and washed away his lands outside of the condemned right-of-way, it was a taking in excess of the land condemned and gives rise to an action for compensation under Article I, section 21, Constitution, providing: "The property of no person shall be taken or damaged for public use without just compensation therefor."

The record shows that plaintiff's lands were subject to erosion by the river solely because of the diversion of its natural course by the drainage district. It was

the drainage district which made the determination of the amount of plaintiff's lands to be taken. The plaintiff was in no position to insist that more was needed and should be paid for. It was contemplated that the pilot channel would adjust itself by the erosive action of the river. The river was to be the agent of the drainage district in converting the pilot channel into an adequate watercourse to carry the waters of the Elkhorn River. In performing this function it left the boundaries of the right-of-way and encroached upon plaintiff's lands. This is clearly an additional taking which gives rise to a cause of action for the land taken under Article I, section 21, of the Constitution. This holding is sustained by Compton v. Elkhorn Valley Drainage Dist., 120 Neb. 94, 231 N. W. 685.

The plaintiff contends further that the drainage district negligently constructed the pilot channel when it failed to dam the old river channel and force all of the water in the river into the new pilot channel. The record shows that the plans and specifications of the drainage district did not provide for such construction. The evidence shows that the drainage district only partially blocked the flow of water into the old channel of the river for the very purpose of permitting water to flow therein and fill the old channel by sedimentation. As the old channel filled up, more water was forced into the new pilot channel as the river adjusted its new course by erosive processes. The condemnation proceeding was therefore res judicata of all such damages. Such damages were properly recoverable in the condemnation proceeding and it is conclusively presumed that they were allowed by the verdict of the jury. The record does not sustain a finding that the pilot channel was negligently constructed.

The plaintiff alleges also that he has suffered damages because of a failure of the drainage district to maintain the new channel. We point out that the Legislature has provided two methods for the organization of drain-

age districts to cover a situation such as we have before us. One is an organization by a proceeding in the district court as provided by Chapter 31, article 3, R. R. S. 1943, which type districts will hereafter be referred to as article 3 districts. The other method of organization is by a petition of landowners to the proper county board as provided by Chapter 31, article 4, R. R. S. 1943, which type of districts will hereafter be referred to as article 4 districts. The defendant district is an article 4 district.

Many of the provisions of articles 3 and 4 are similar. The provisions of article 3, however, provide for the maintenance and repair of the project constructed, while the provisions of article 4 impose no such duty upon the district. Consequently, we find cases involving article 3 districts which compel maintenance and repair by the districts, or sustain judgments for damages for failure by the districts to do so. Among the cases so holding are the following: Richardson County v. Drainage Dist. No. 1, 113 Neb. 662, 204 N. W. 376; Mooney v. Drainage Dist., 126 Neb. 219, 252 N. W. 910; Mooney v. Drainage Dist., 134 Neb. 192, 278 N. W. 368; Ritter v. Drainage Dist. No. 1, 137 Neb. 866, 291 N. W. 718; Ritter v. Drainage Dist. No. 1, 148 Neb. 873, 29 N. W. 2d 782; County of Johnson v. Weber, 160 Neb. 432, 70 N. W. 2d 440.

In cases involving drainage districts organized under article 4, the district has been held liable for negligent construction of the improvement, but has not been held liable for failure to maintain and repair, except where the latter was provided for in the plans and specifications of the project. This is due to the fact that article 4 does not impose the duty of maintaining and repairing its works upon the drainage district. In Idlewild Farm Co. v. Elkhorn River Drainage Dist., 116 Neb. 300, 216 N. W. 817, we stated: "The general rule, as we deduce it from the authorities and from our statutes, is that where the law authorizes the diversion of a river, and where such diversion has been effected by a construction which is nonnegligent, the duty devolves upon the

owner of the abutting lands to maintain the river in its new course, and not upon the drainage district which did the work, unless the plans and specifications of the project specifically provide for such maintenance by said district." Other cases to this effect are: Bunting v. Oak Creek Drainage Dist., 99 Neb. 843, 157 N. W. 1028, L. R. A. 1918B 1004; Boschulte v. Elkhorn River Drainage Dist., 102 Neb. 451, 167 N. W. 730; Hopper v. Elkhorn Valley Drainage Dist., 108 Neb. 550, 188 N. W. 239; Compton v. Elkhorn Valley Drainage Dist., *supra*.

The latter case appears to be the last case decided by this court in which an article 4 drainage district was involved on similar issues. It also appears to be the first case in which Article I, section 21, of the Constitution, was given consideration and applied to an article 4 district. The effect of its holding is that liability attaches for a condition amounting to a second taking or damaging of the landowner's property. It superimposes Article I, section 21, of the Constitution, upon previously declared rules governing article 4 drainage districts and, we think, properly so. In an action for damages based upon Article I, section 21, of the Constitution, against a drainage district organized under the provisions of Chapter 31, article 4, R. R. S. 1943, for the taking of private property for a public use, it is not necessary for plaintiff to file the notice required by section 31-451, R. R. S. 1943. Quest v. East Omaha Drainage Dist., 155 Neb. 538, 52 N. W. 2d 417.

The trial court sustained objections to evidence tending to show damage to the remaining lands. The evidence shows that such damages to the lands not taken were issuable in the previous condemnation proceedings. Plaintiff may not again obtain a judgment for damages which were or should have been litigated in the condemnation proceeding. Gruntorad v. Hughes Bros., Inc., 161 Neb. 358, 73 N. W. 2d 700.

We arrive at the following conclusions: No duty is

imposed upon a drainage district organized under Chapter 31, article 4, R. R. S. 1943, to maintain its works. Such a drainage district is liable for maintenance and repair only when the plans and specifications of the project so provide. Such a drainage district may be held liable for negligence in the construction of its works. When the application for condemnation specifies the desired taking and use of the real estate being taken, all damages caused by such taking and use properly exercised will be included in the damages allowed in such proceedings and will bar any further claim for such damage. Where property in excess of that condemned is taken, an action lies for its value under Article I, section 21, of the Constitution.

The trial court erred in dismissing that part of plaintiff's petition praying for the reasonable value of the land taken outside of the right-of-way as condemned by the drainage district. Other causes of action were properly dismissed. The trial court properly sustained the prayer of defendant's cross-petition. The judgment of the district court is reversed and the cause remanded with directions to the trial court to determine the amount of land taken outside of the right-of-way condemned, to determine its value, and enter a judgment for the plaintiff for the amount thus found due.

REVERSED AND REMANDED WITH DIRECTIONS.

MARTHA E. HILLEREGE, APPELLANT, V. CITY OF SCOTTSBLUFF, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
83 N. W. 2d 76

Filed May 10, 1957. No. 34074.

1. **Municipal Corporations.** The title to a street vested in a city is not generally a fee simple absolute but is a qualified base or determinable fee and it is held in trust for the purposes to which the street is dedicated.
2. ———. The right which an owner of abutting property possesses in a street is different in kind from that possessed by

one whose interest is only that of a right-of-way along the street.

3. **Municipal Corporations: Constitutional Law.** The right of an owner of property abutting on a street to ingress and egress to and from his premises by way of such street is a property right in the nature of an easement in the street which the owner of the property has, not in common with the public generally, and of which he cannot be deprived without due process of law and compensation for his loss.
4. **Municipal Corporations.** The owner of property abutting on a street is not entitled, as against the public, to access to his land at all points in the boundary between it and a street, although entire access cannot be denied him. The measure of the right of the property owner is reasonable ingress and egress under all the circumstances.
5. **Municipal Corporations: Constitutional Law.** The grant by the state to a city of the power to control and improve streets or any part of them in any manner it deems proper is the delegation of police power to be exercised with a sound discretion in a reasonable and not in an arbitrary or discriminatory manner.
6. ———: ———. It is the right of a city, in the exercise of the police power delegated to it in reference to its streets, to determine the action required for the safety, convenience, and welfare of the public.
7. ———: ———. The action of a city in the exercise of the police power is not absolute or final but is subject to judicial review.
8. ———: ———. The test in such a case is whether or not the action proposed is a good faith, reasonable exercise of the police power or an arbitrary and unreasonable interference with the rights of persons affected thereby.
9. ———: ———. Action taken by a city in the exercise of the police power is presumed to be valid and the burden is on the litigant contesting its validity to establish by clear and unequivocal proof that it is so unreasonable, arbitrary, or discriminatory as to amount to depriving the litigant of his property without due process of law.
10. ———: ———. Municipal action, in the exercise of the police power, is not necessarily invalid because it infringes on private rights or property but such infringement may not be unreasonable, discriminatory, or confiscatory.
11. ———: ———. It is a denial of equal protection of the law to apply a regulation differently to different persons under the same or similar circumstances.
12. ———: ———. Municipal action applicable to all persons affected thereby within the area described is not discriminatory.

13. **Municipal Corporations: Injunctions.** The general rule is that prospective action of a city in the exercise of legislative power in relation to a subject committed to its jurisdiction cannot be enjoined. Courts will not ordinarily intervene until some effort is made to enforce alleged unauthorized action taken by the city.

APPEAL from the district court for Scotts Bluff County: JOHN H. KUNS, JUDGE. *Reversed and remanded with directions.*

Mothersead, Wright & Simmons and *Robert M. Harris*, for appellant.

Clarence S. Beck, Attorney General, *Harold S. Salter*, and *Loren G. Olsson*, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Appellant by this action seeks an injunction preventing appellees from erecting any structures which will interfere with the use of described parking areas of appellant unless and until appellees establish the right to do so by due process of law, and preventing appellees from giving effect to a designated contract made by them concerning the regulation of parking in the street adjacent to the front of described properties owned by appellant.

The appellant states three causes of action which are in substance the following:

The first relates she is the owner of specifically described real estate in Scottsbluff on which prior to the year 1955 she constructed extensive and valuable improvements, a portion of which is a paved parking area where customers using the improvements may park their motor vehicles thereon and off of the right-of-way of the public streets. The property is in the condition it has been since before the year 1955. The parking area is of value to the appellant and the described premises, and the loss of the use of the parking

area would greatly depreciate the value of the entire premises. Appellees will, unless enjoined by the court, erect structures on the right-of-way of a public street adjoining the parking area, designed, intended, and adequate to make it impractical and impossible to use the parking area. The structures will deprive the appellant of the use of her property without due process of law and will cause her irreparable damage. She has no adequate remedy at law.

The second states appellant is the owner of described real estate in Scottsbluff on which are valuable improvements and in front of which there is and has been for many years an area provided and used for parking motor vehicles. The parking area is of value to the premises and the other improvements thereon. Appellees intend to and will, unless enjoined by the court, construct structures upon the right-of-way of a public street in front of and adjacent to the parking area, designed, intended, and adequate to make it impractical and impossible to use the parking area. The structures will deprive appellant of the use of her property without due process of law and will cause her irreparable damage. She has no adequate remedy at law.

The third claims appellant is the owner of the premises described in the preceding causes of action. The freedom to park motor vehicles on the street adjacent to the premises is of great value to the appellant. Appellees made and executed an instrument in writing on or about August 11, 1955, by which they mutually agreed that parking in the street in front of the premises of appellant should be adjacent to and parallel with the curb and no nearer than 14 feet of the center line of the street. The city bound itself to cooperate fully with the state in the matter of on-street parking at said places; and if the state should require definite regulations other than those in effect, the city agreed to cooperate fully with the state and to pass an ordinance containing and making effective such measures as may be required

by the state. Appellees consider the instrument to be a valid and binding contract and they intend to carry out its provisions. The instrument purported to be authorized by a resolution of the council of the city. It does not appear in the minutes of the proceedings of the council and the instrument has not been published as required by law. The instrument is an attempted illegal delegation of legislative action by the city and is an attempt to create an ordinance without compliance with statutory mandates precedent to the passage and effectiveness of an ordinance. It is unconstitutional and void and its enforcement would deprive appellant of her property without due process of law.

The State of Nebraska, Department of Roads and Irrigation, hereafter referred to as State, denied all claims made by appellant and alleged the following: Appellees made an agreement July 13, 1955, for the widening and improvement of the portion of Twenty-seventh Street of the city of Scottsbluff, referred to hereafter as city, beginning at its intersection with Avenue A and extending westerly to the intersection of Twenty-seventh Street with State Highway No. 87, a copy of which agreement is exhibited as a part of the answer. The city and the State executed the instrument on August 11, 1955, referred to by appellant in her third cause of action, and it is a binding contract between the parties. The city regulates traffic and parking upon its streets and sidewalks. It determines the width of the paved surface, the location and dimension of curbs, and the location and width of sidewalks within the city on its street rights-of-way. Appellant has no vested interest in or property right to the flow of traffic of Twenty-seventh Street.

The city denied all allegations of appellant except those as to the class and status of the city, the ownership of the real estate in the city as alleged by appellant, and the execution of the instrument referred to by appellant as having been made and entered into by

appellees. The city alleged it regulates traffic and parking upon the streets and sidewalks and that it determines the width of the paved surface, the location and dimension of curbs, and the location and width of sidewalks within the city on its street rights-of-way.

The reply of appellant was a denial and a claim that the action contemplated by appellees discriminates against appellant in attempting to deny her use of the streets which is permitted to other persons similarly situated.

The parties agree that Scottsbluff, Nebraska, is a city of the first class with a population of less than 40,000 inhabitants; that it is not a home rule city; and that appellant is the owner of Lots 13 and 14, Block 2, Beatty Tracts, an addition to the city of Scottsbluff, designated herein as Tract 1, and Tract No. 24, Goos Tracts, an addition to the city of Scottsbluff, spoken of herein as Tract 2.

The district court found that: The real estate of appellant abuts Twenty-seventh Street, is improved, and is used for business purposes. Prior to 1955 appellant paved the area of the real estate described in the first cause of action northward from the north line of the sidewalk to the south boundary of Twenty-seventh Street, and customers transacting business on the premises parked motor vehicles partly on that pavement and partly on Twenty-seventh Street but not upon the paved portion of the street. A similar use was made of the real estate involved in the second cause of action except no part of it has been paved. There are no barrier curbs in front of the real estate of appellant. The city adopted an ordinance August 4, 1953, creating an improvement district for widening and improving a portion of Twenty-seventh Street beginning at Avenue A and continuing westward past the real estate of appellant. The ordinance was duly published. Plans and specifications for the project were approved by resolution of the city council and they provide for con-

struction of barrier curbs in front of the premises of appellant. These change the method by which persons operating vehicles have access from Twenty-seventh Street to each of the properties of appellant. The change in access will prevent parking vehicles as was done before such construction and it will lessen and may eliminate such parking. The plan for barrier curbs is uniform within the improvement district except at the entrances to filling stations. Parking space for customers at other business properties is provided in the manner appellant has done on the route of U. S. Highway No. 26 within the city and at other places which do not abut upon the highway. The city has not commenced condemnation proceedings because of the street improvement district or anything that is contemplated to be done within it. No part of the street improvement is upon private property and the proposed construction will not interfere with the use by the public of the street for highway purposes. There is proof that completion of the construction as provided by the plans and specifications will substantially diminish the value of the property and the value of the use of the property of appellant. The State is assisting the city in the preparation of plans and specifications and in the supervision of construction. It does not make or enforce restrictions upon the use of property abutting on the street.

The trial court made no finding as to the four issues indicated because of its conclusion that they were each immaterial in this case and that the record exhibited no facts that would justify findings thereon, to wit:

1. The validity of ordinances which may be subsequently enacted by the city for the regulation of parking upon Twenty-seventh Street.

2. The right of the city to regulate parking and access of vehicles to privately owned property without compensation to the owners of abutting property.

3. The right of the Department of Roads and Irrigation, State of Nebraska, to demand or request the

adoption of ordinances by the city pursuant to the terms of the contract previously executed.

4. The right of the plaintiff to institute action under section 76-705, R. S. Supp., 1955, for the ascertainment and recovery of consequential damages claimed by her.

The judgment was that "both causes of action" be dismissed and the temporary injunction granted in the case be dissolved, all without prejudice to an action at law by appellant for the recovery of damages which may result from the construction proposed by the city or from the adoption of later regulations restricting parking and access of vehicles to the properties owned by appellant. The motion for a new trial was denied; hence this appeal.

This case is concerned with the part of Twenty-seventh Street of the city west of Broadway Avenue which extends north and south. The direction of Twenty-seventh Street, which is also spoken of in the record as West Twenty-seventh Street, is east and west. It is a business street and it continues from Broadway Avenue to Avenue I a distance of about 1 mile. It lies in the route of U. S. Highway No. 26 and Nebraska State Highway No. 29 as they are located through the city. These will be spoken of as Highway No. 26 and Highway No. 29, respectively. The right-of-way of Twenty-seventh Street was, at the commencement of this action, 66 feet in width and the paved surface of it was 20 feet wide. The center line of the paved portion of the street was the center line of its right-of-way. There were no curbs on the street. The surface of the right-of-way on either side of the pavement was dirt or gravel.

Appellant has owned and does own Tract 1 known as Terry's Town and Country. It consists of the real estate and improvements thereon. The building is 100 feet from east to west and about 118 feet from north to south. In it is conducted a drug store, a super-foods market, and other businesses. The front of the build-

ing is toward the north. The real estate abuts on the south side of Twenty-seventh Street and on the east side of Avenue D. The distance from the north line of the building to the north property line, which is the south line of Twenty-seventh Street, is between 18 and 19 feet and the distance from the east right-of-way line of Avenue D to the west property line is about 14 feet. It is 47 feet from the east line of the building to the east property line. This area is devoted to the parking of customer vehicles and it is designated customer parking lot. There is a private concrete sidewalk about 7 feet wide along the entire front or north side of the building. There is a private paved parking area about 11 feet wide extending from the north edge of the sidewalk to the south right-of-way line of Twenty-seventh Street which was provided and completed when the building was constructed about the year 1947. The patrons of the businesses conducted in the building have been permitted to and they have since the building was constructed parked their automobiles to the north of and at right angles to the building with the front of the cars to the south. They have been privileged to have the front wheels of their cars against the north edge of the sidewalk and to let the front of the vehicles overhang the sidewalk. It has been possible to park at one time in the manner described as many as ten or eleven automobiles north of the building. The length of motor vehicles is from 14½ feet to about 18 feet. The rear part of such vehicles parked north of the street in the manner described was far enough north so that it extended into and occupied to some extent the right-of-way of Twenty-seventh Street. There was evidence of the owner of a 1949 Packard sedan, about 17 feet in length, that he had parked it with his front wheels against the north edge of the sidewalk in front of the building and within about 12 inches of another parked car on the left of the Packard car, and that he backed the Packard to a point so that he could proceed to his left or to the east

without any part of his car overlapping or extending to the paving on Twenty-seventh Street.

The south part of Tract 2 owned by appellant abuts the north side of Twenty-seventh Street and the west part of the property abuts the east side of Avenue F. In the building on the premises is a business described as Bendix Laundrette. The front of the building is toward the south and Twenty-seventh Street. Its front line is about 12 feet north of the north right-of-way line of Twenty-seventh Street and the west line of the building is about 6 feet east of the east right-of-way line of Avenue F. There is a private sidewalk about 4 feet wide that is adjacent to and along the front of the building. The patrons of the Laundrette have parked their vehicles in front of the building at right angles to the building. The vehicles parked in this manner extend south into the right-of-way of Twenty-seventh Street but not to or on the paved portion of the street.

In August 1953 the city, by proceedings duly had, decided to improve Twenty-seventh Street from the east line of Avenue A to a point 200 feet west of the west line of Avenue I by laterally extending the concrete roadbed 14 feet on either side of the existing pavement thereon so that the paved highway on the street could consist of four lanes of 12 feet each. The work contemplated by the improvement of the street was described as grading, curbing, guttering, paving, and drainage as provided by plans, specifications, and estimates to be thereafter adopted. The ordinance creating the improvement district was published and notice of the erection of the district was given as required by law. There is no issue as to the regularity of the proceedings creating the district or as to the validity and effectiveness of the city legislation establishing it. The city, in the manner permitted by law, made a contract with the State of such a nature that it enabled the city to obtain federal aid funds on account of the project. The city, by resolution, approved plans for the project July

18, 1955. The plans provided for the work above related, including the installation of median curbs, gutters, and barrier curbs in front of all properties within the project. The regular median curb is at the outer edge of the surfaced portion of the street. It is primarily for drainage purposes and for delineating driveway openings. The median curb is about 9 feet inside of the right-of-way line. The barrier curbs restrict the use of public property, the street right-of-way, for parking purposes or any other use which abutting properties might wish to make of that public property. Barrier curbs are constructed on the right-of-way adjacent to the right-of-way line and join at intersections and driveways with the median curbs. The plans permit ingress and egress to and from all properties abutting on the street. The curb cut for driveway purposes in front of Tract 1 of appellant is 23 feet and, likewise, the curb cut for driveway purposes serving Tract 2 owned by appellant is 33 feet. There is evidence that an object of barrier curbs is to prevent the area between the median curbs and the street right-of-way line being utilized for parking or other purposes that would cause a hazard to the traveling public by obscuring the vision of vehicles entering and leaving abutting properties and of traffic moving on the street. The available means to accomplish these purposes are barrier curbs, guard posts, or guard rails. There is a heavy volume of traffic on Twenty-seventh Street. An estimate of 200 motor vehicles enter and leave the parking stalls in front of Terry's Town and Country in the period of an average 10-hour day when the supermarket is open for business.

The testimony of appellant was not disputed that the value of Tract 1 was about $100,000, that the construction of the barrier curbs in front of and near the building thereon would diminish the value of the property to $40,000 or $50,000, and that the rental value and the rent received from the property is $600 per month. Tract

1 has been rented to the same tenant since it was built and the lease has not expired. The tenant is a partnership and the members thereof corroborated the testimony of the owner of the premises that the fair and reasonable rental thereof is $600 per month and that the rental value thereof, if the barrier curbs are constructed as planned, would be reduced to $300 per month or less. Appellant testified, and is not contradicted in the record, that the value of Tract 2 was $25,000 to $30,000; that it has been and is rented for $115 per month on a term lease that has not expired; and that if the barrier curbs are constructed affecting this property as proposed, the value thereof would be reduced to $12,000 or $15,000.

The essence of the complaint made by appellant in each of the first and second causes of action is that appellees will, unless prevented by mandate of the court, construct on the right-of-way of Twenty-seventh Street in front of the parking area of each of the properties of appellant, structures, median and barrier curbs, designed, intended, and adequate to make it impractical, and probably impossible, to use the parking area of each of the properties of appellant as they have been used and would continue to be used if the curbs were not erected as proposed by the city. If the proposed curbs were eliminated from the street improvement as it affects the property of appellant, the substance of this lawsuit would be dissipated. Appellant believes and argues that the city cannot legally accomplish its purpose in this respect without first ascertaining by proper proceedings and paying, or providing in a legal way for the payment, to appellant any damages accruing to her as an abutting owner occasioned by the contemplated street improvement as planned. Inherently the position of appellant contains a claim that the contemplated improvement of the street, even though attempted by the exercise of the police power, may not be accomplished without the payment of damages to appellant because the mere construction of the barrier curbs in front of the real estate

of appellant will reduce the reasonable value of it about 50 percent and that she contends is confiscatory. Appellant appeals for support of her position to the constitutional assurance that the property of no person shall be taken or damaged for public use without compensation therefor. Art. I, § 21, Constitution of Nebraska. She characterizes this as the basic law involved in this case.

The capability of a city in the exercise of the police power delegated to it is not absolute and unlimited. Municipal action may not be so arbitrary, unreasonable, confiscatory, or discriminatory as to deprive an owner of property without due process of law.

It is said in City of Scottsbluff v. Winters Creek Canal Co., 155 Neb. 723, 53 N. W. 2d 543: "In the exercise of police power delegated to a city it is generally for the municipal authorities to determine what ordinances are required for the health, safety, and welfare of the people, but their action is not final and is subject to scrutiny of courts. * * * The test in such cases is whether the ordinance in question is a bona fide exercise of police power or an arbitrary and unreasonable interference with the rights of individuals under the guise of police regulation. * * * A municipal ordinance enacted in the exercise of police power is not necessarily invalid because it infringes on private rights or property, but such infringement should not be arbitrary, unreasonable, or confiscatory."

In Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 332, 28 A. L. R. 1321, it is declared: "As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone." See, also, Chicago, B. & Q. R. R. Co. v. State of Illinois ex rel. Drainage Commissioners, 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596.

It is true, as appellant asserts, that it has been some-

times stated that the fee of the street is in the municipality. This form of statement was sufficient for the facts the court was then considering and it was not necessary for it to determine or precisely declare in those cases the exact nature of the ownership a city has of a street or the condition and qualification of its title. It is generally recognized that under legislation such as prevails in this state the title of a street vested in a municipality is not a fee simple title absolute but a qualified base or determinable fee and that the title which the municipality has is held in trust for the purposes for which the street is dedicated. This court stated in Burlington & M. R. R. Co. v. Reinhackle, 15 Neb. 279, 18 N. W. 69, 48 Am. R. 342: "The fee of streets is in the public; but it is held in trust for public use. The municipal corporation cannot sell or permanently obstruct the streets without compensation to the owners of property specially injured thereby. The trust like any other must be exercised in good faith. It was created to give permanency to streets and apply them wholly to the use of the public." See, also, Jaynes v. Omaha Street Ry. Co., 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751; Belgum v. City of Kimball, 163 Neb. 774, 81 N. W. 2d 205; Annotation, 11 A. L. R. 2d 549.

A city cannot prohibit the use of a street for travel thereon or for any reasonable incident of travel. It may reasonably regulate but it cannot prohibit. The right of an owner of property abutting on a street to ingress and egress to and from his premises by way of such street is a property right in the nature of an easement in the street which the owner of abutting property has, not in common with the public generally, and of which he cannot be deprived without due process of law and compensation for his loss.

It is stated in Jaynes v. Omaha Street Ry. Co., *supra*: "As an abutting property owner she (the plaintiff) has the right to free ingress and egress to and from this property and to and from the street * * *."

Michelsen v. Dwyer, 158 Neb. 427, 63 N. W. 2d 513, states: "The rights which an owner of abutting property possesses in a street are different in kind from those possessed by one whose interest is only that of a right-of-way along the street."

In Hathaway v. City of Sioux City, 244 Iowa 508, 57 N. W. 2d 228, it is said: "Whatever might be our conclusion if we had a simple question between private owners of abutting premises * * * there is involved here an additional and, we think, a controlling element, viz., plaintiffs' right of ingress to and egress from their premises by way of First Street. This is a property right, an easement in the street which the owner of abutting property has, not common to the public generally and which cannot be taken away without just compensation. * * * This property right of access and egress is appurtenant to plaintiffs' premises."

It is stated in Anzalone v. Metropolitan District Commission, 257 Mass. 32, 153 N. E. 325, 47 A. L. R. 897: "Access to a public way is one of the incidents of ownership of land bounding thereon, and this right is appurtenant to the land and exists when the fee of the way is in the municipality as well as when it is in private ownership."

Genazzi v. County of Marin, 88 Cal. App. 545, 263 P. 825, asserts: "* * * an abutting land owner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right of easement which cannot be damaged or taken from him without due compensation." See, also, Liddick v. City of Council Bluffs, 232 Iowa 197, 5 N. W. 2d 361; Breinig v. Allegheny County, 332 Pa. 474, 2 A. 2d 842; 25 Am. Jur., Highways, § 154, p. 448; 64 C. J. S., Municipal Corporations, § 1701, p. 96; Annotations, 22 A. L. R. 942, 47 A. L. R. 902, 66 A. L. R. 1052.

The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the

circumstances. The right of access does not extend to all points in the boundary between the abutting property and the street. In Denman v. City of Tacoma, 148 Wash. 314, 268 P. 1043, it is said: "We recognize the law to be that a land owner may have a special right of ingress and egress to and from his land of a special nature, differing from and superior to the right of the public, even over portions of a highway not directly abutting upon his land. We concede that appellant has such a right under the circumstance here presented. The extent of that right is the real question here presented. Its measure, we think, is simply reasonable ingress and egress under all the circumstances. Freeman v. Centralia, 67 Wash. 142, 120 Pac. 886, Ann. Cas. 1913D 786."

This appears in Genazzi v. County of Marin, *supra*: "Generally speaking, an abutting land owner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right of easement which cannot be damaged or taken from him without due compensation. But an owner is not entitled, as against the public, to access to his land at all points in the boundary between it and the highway, although entire access cannot be cut off. If he has free and convenient access to his property, and his means of ingress and egress are not substantially interfered with by the public, he has no cause of complaint."

Bacich v. Board of Control, 23 Cal. 2d 343, 144 P. 2d 818, states: "* * * an owner of property abutting upon a public street has a property right in the nature of an easement in the street which is appurtenant to his abutting property and which is his private right, as distinguished from his right as a member of the public. * * * The extent of the easement of access may be said to be that which is reasonably required giving consideration to all the purposes to which the property is adapted." See, also, 64 C. J. S., Municipal Corporations, § 1703, p. 99.

The charter of the city authorized it to make the street improvement involved in this case. The relevant provisions of section 16-609, R. R. S. 1943, are: "The council shall have power to * * * control, * * * extend, widen, * * * grade, curb, gutter * * * and pave or otherwise to improve * * * in any manner it may deem proper, any street, avenue or alley * * * or part of either * * *." This grant by the state to the city was a delegation of police power to be exercised in harmony with a sound discretion in a reasonable and not in an arbitrary or discriminatory manner. State ex rel. Andruss v. Mayor and Council of City of North Platte, 120 Neb. 413, 233 N. W. 4. It is generally for the municipal authorities, in the exercise of the police power delegated to the city in reference to its streets, to determine what action is required for the safety, convenience, and welfare of the people. Its action in this respect is not final but is subject to judicial review. The test in such a case is whether or not the action proposed is a good faith, reasonable exercise of the police power or an arbitrary and unreasonable interference with the rights of the person or persons affected thereby. The action taken by the city is presumed to be valid and the burden is on the litigant contesting it as invalid to establish by clear and unequivocal proof that it is so unreasonable, arbitrary, confiscatory, or discriminatory as to amount to depriving the litigant of property without due process of law. City of Scottsbluff v. Winters Creek Canal Co., *supra*; State ex rel. Andruss v. Mayor and Council of City of North Platte, *supra;* Council Bluffs Transit Co. v. City of Omaha, 154 Neb. 717, 49 N. W. 2d 453; Graham v. Graybar Electric Co., 158 Neb. 527, 63 N. W. 2d 774.

Scottsbluff is a growing city. The street in question is one of its much-traveled principal streets. It is a business street. It is the route of two improved, favored highways. The volume of traffic upon it is very heavy. The paved part of the street is, or will be when the improvements are accomplished, 48 feet wide. The distance

from the center of the paved portion to the median curb is 24 feet. There are thereon but two lanes of travel of 12 feet each. During an average business day of 10 hours when Terry's Town and County is operating, about 200 automobiles are parked in the parking spaces in front of the building. This is an average of 20 each hour and 1 each 3 minutes coming in and going out. The automobiles are generally about 15 feet to 18 feet long. The facts recited herein make it certain that the rear of an automobile parked in front of the building at right angles thereto is in the right-of-way of the street and quite close to the south edge of the pavement and, according to the evidence, usually about 12 feet from the center of the right-of-way when backed out of the parking sufficiently to leave by turning and proceeding to the right or left past other parked cars.

The rear end of an automobile parked at right angles in front of the building on Tract 2 is close to the median curb. The distance from the south line of the sidewalk in front of the building to the median curb or the north edge of the street pavement is about 17 feet. The operation of parking in that location in that position and the operation of leaving the parking not only necessitates using and occupying a part of the street but going upon and using the paved portion of it. There is even a hazard that vehicles may be backed out of the parking to the south across the center line of the pavement.

The testimony of one operator of an automobile 17 feet in length that was parked with its front wheels against the sidewalk in front of the building on Tract 1 about 12 or 14 inches from a parked car to the left and that the operator backed it out of the parking and drove to the right or east without driving onto the street pavement is not convincing of the absence of hazard from the parking of automobiles north of the building with free and unlimited ingress and egress to and from the street. There was no car parked in the parking space immediately to the right of the car used in this test of the

situation. This experience does not demonstrate much. The city was not confronted with an ideal situation when is was considering and exercising its discretion in the planning and improvement of the street for the safety and convenience of the public. The problem was the hazard in the ordinary operation of automobiles parked in the spaces under the circumstances shown, and not what is possible for a careful driver to do on a single occasion or what could happen in only one of many different circumstances or what would take place if a motorist would never fail to exercise sound judgment and due care.

Appellant insists that there is no traffic hazard involved in the existing situation. She says the State or city has not determined that a hazard existed in the area because of the parking and that the same conditions have existed in front of her property since 1947. The inference is that because there had not been an accident, it is unreasonable for the city to take action to improve a situation for the benefit of the public. It is not essential that inevitable accident will result from a situation before it becomes reasonable for a city to take action to remove the danger of accident and injury from what it evaluates as a hazardous condition.

It was sufficient justification for the action of the city that a condition existed which was of such unusual hazard that in view of the frailty of mankind and the tendency to be careless, accidents would be so likely to happen that the public should not be exposed to them. The city has not invaded and does not propose to invade the physical property of the appellant. The improvement it desires to make is wholly within the right-of-way of the street. It does not contemplate placing any restriction on the property or the use of property of appellant. It has made provision for reasonable ingress and egress by way of the street to and from her property. Appellant has no legal right to appropriate a part of the street to the purposes of her private business or to

be used as a part of or to improve and make more useful a facility used in the conduct of her business. The record makes it clear that the appellant seeks the aid of equity to assure her against the loss of an operation which cannot be carried on without the use of a part of a street which the city holds in trust for the use of the public. The plan proposed by the city is justified for the safety and convenience of the public. It is reasonable and it is a proper exercise of the police power by the city.

The manner of the exercise of the authority of the city to improve the street is not contested. There is an objection based on the fact that the ordinance recites that the improvement of the street is to be done according to plans and specifications thereafter approved; that the plans and specifications were approved by the council of the city by resolution which was only published in the minutes of the meeting of the council; and that the plans provide for median and barrier curbs intended as and constituting a regulation of traffic and this could have only been legally accomplished by the passage and publication of an ordinance as provided by law. This argument is untenable. The charter provision empowered the city to construct curbs in the street. When the city properly exercised power to make the improvement, it could provide for and construct any kind of reasonable curbs the exercise of a sound discretion dictated without further city legislation.

Appellant contends that the plans for the improvement of the street are invalid because they deny use of a street to her which is permitted to others and they are, therefore, discriminatory. The doctrine relied upon in this respect is operative only if a regulation is applied differently to different persons under the same or similar circumstances. The engineer for the Department of Roads and Irrigation testified that curbs are provided generally in front of all properties, without

exception, located on Twenty-seventh Street and that this is reflected in the plans of the project which are in evidence. This means that all abutting property owners in this improvement district are in this regard treated alike. There is no legal discrimination and the complaint is not valid. In Gardner v. City of Brunswick, 197 Ga. 167, 28 S. E. 2d 135, the court said: "The plaintiff in error contends that the ordinance is discriminatory. An examination of the ordinance discloses that it applies alike to all persons and property owners located within the area described in the ordinance. 'It is only in cases where laws are applied differently to different persons under the same or similar circumstances that the equal protection of the law is denied.' (Citing many cases.) * * * As pointed out above, the ordinance in question is applicable alike to all persons and property owners affected within the area described in the ordinance, and under the authorities cited, it cannot be held to be discriminatory." See, also, Hoyne v. Wurstner (Ohio App.), 63 N. E. 2d 229. In addition to the foregoing, the evidence offered in support of this contention is not sufficient to show a legal discrimination.

Appellant assails the validity of a writing supplemental to the original principal contract made by appellees concerning the street improvement to the effect that all parking within the limits of the project shall be adjacent to and parallel with the curb and in no event nearer than 14 feet to the center line of the project; and that if the State should determine later that highway traffic would require definite regulations other than those in effect when the writing was made, the city agreed to cooperate with the State in such matters and to pass an ordinance to incorporate such measures as may be required. The record shows that appellees believe and recognize the writing as a valid and binding obligation and that they expect to observe it. However, it is not established that any action has been proposed or attempted to be taken because of it. The fears of

appellant are anticipatory. The attempt to contest the action of the city council because of the writing is premature. Lee v. City of McCook, 82 Neb. 26, 116 N. W. 955; Chicago, R. I. & P. Ry. Co. v. City of Lincoln, 85 Neb. 733, 124 N. W. 142; Leeman v. Vocelka, 149 Neb. 702, 32 N. W. 2d 274; Noble v. City of Lincoln, 153 Neb. 79, 43 N. W. 2d 578; Annotation, 140 A. L. R. 439.

The city had, when the writing was made, an ordinance requiring parallel parking at the curb on all streets except where otherwise provided by resolution of the city council and the record does not exhibit any resolution of the city council concerning parking vehicles on Twenty-seventh Street in any manner contrary to the requirement of the ordinance. There is no evidence to sustain the third cause of action and the court should have dismissed it because of absence of proof concerning it.

It is recognized that this is a case in equity triable de novo in this court. It has been considered and decided in that manner. Appellant has failed to establish any of the causes of action pleaded. The case should be dismissed. The judgment of the trial court should be reversed because it disposes only of two of the three causes of action and as to these the decision of the court is without prejudice to another action.

The judgment should be and it is reversed, the cause is remanded to the district court for Scotts Bluff County with directions to render a judgment dismissing the case, and the costs should be taxed to appellant.

REVERSED AND REMANDED WITH DIRECTIONS.

ALFRED SCHUTTE, FATHER AND NEXT FRIEND OF GARY SCHUTTE, A MINOR, APPELLANT, V. FREEMAN DECKER, COMMISSIONER OF EDUCATION AND SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL., APPELLEES.
83 N. W. 2d 69

Filed May 10, 1957. No. 34121.

1. Statutes. In construing a statute the legislative intent is to be gathered from the necessity or reason for its enactment, and its several provisions should be construed together, in the light of the general objects and purposes of the act, so as to give effect to the main intent.
2. ———. Where words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning, and no court can read a meaning into a statute that is not warranted by the legislative language, nor can it read the plain, direct, and unambiguous language out of the statute, but words must be given their ordinary meaning and, if possible, the entire statute applied.
3. ———. Where the language of a statute is plain and unambiguous there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning.
4. Schools. Sections 43-604 to 43-611, R. R. S. 1943, constitute an independent act dealing exclusively and fully with the education of physically handicapped children and for the expenses of such education.
5. ———. Section 79-490, R. S. Supp., 1955, and other sections of the statutes relating to the general school laws have no applicability to the transportation of a physically handicapped child who is required to attend a special school outside of the school district in which he lives.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

Stiner & Boslaugh and *James W. Hewitt*, for appellant.

Clarence S. Beck, Attorney General, *Gerald S. Vitamvas*, and *Howard S. Foe*, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, and WENKE, JJ.

MESSMORE, J.

This is an action brought in the district court for

Lancaster County by Alfred Schutte as father and next friend of Gary Schutte, a minor, handicapped child who is educable, against Freeman Decker, Commissioner of Education and Superintendent of Public Instruction for the State of Nebraska, Consolidated School District No. 90, Webster County, and the members of the school board of school district No. 90. The purpose of the action was to obtain a declaratory judgment construing sections 79-490, R. S. Supp., 1955, and 43-607, R. R. S. 1943, and to determine whether or not the plaintiff was entitled to recover certain transportation expenses. The defendant Decker moved to dismiss the plaintiff's action, and the defendant school board demurred to the plaintiff's petition. The trial court, as well as the parties, considered the motion to dismiss by Decker as a demurrer. The trial court sustained the motion to dismiss and the demurrer of the school board, and dismissed the plaintiff's action. The plaintiff filed a motion for new trial. From the order overruling the motion for new trial, the plaintiff appeals.

For convenience we will refer to the parties as designated in the district court; to Freeman Decker, Commissioner of Education and Superintendent of Public Instruction, as Decker; to the Consolidated School District No. 90 as school district; and to the members of the school board of district No. 90 as the school board.

The plaintiff's petition, after identifying the parties, alleged in substance that the school district had no facilities, instructors, or equipment for the education of physically and mentally handicapped children as provided for in section 43-606, R. R. S. 1943; that Hastings, Nebraska, located approximately 35 miles from the school district, had the closest available school for the education and training for handicapped children as defined in section 43-604, R. R. S. 1943, as amended in 1953; that Gary Schutte was educable and qualified for instruction as provided by the laws of Nebraska; that Decker, under section 79-306, R. R. S. 1943, instructed

the school board to refuse to allow transportation costs of Gary Schutte to Hastings; that Decker, in his official capacity, instructed the plaintiff that it was his order and opinion that the laws of Nebraska did not provide for such transportation and he so instructed the school district and the school board, and consequently the school district refused to furnish transportation costs for Gary Schutte to Hastings for educational training, Hastings being located outside the school district; that sections 43-604 to 43-611, R. R. S. 1943, provide for compulsory education of educable children and make provisions for the care and expenses of such education, and section 79-490, R. S. Supp., 1955, provides for transportation outside of said school district; that Decker had ruled that the foregoing sections did not provide for transportation or costs for the said Gary Schutte and had therefore denied such costs for the benefit of Gary Schutte; and that transportation is necessarily included as a part of the educational opportunities and the school board was compelled to furnish it under the statutes heretofore set out.

The only question to be determined in this appeal is whether or not a school district of this state which sends a handicapped child to a special school outside the school district is liable for transportation expenses of such child.

The plaintiff sets forth four assignments of error which may be stated as one, namely, that the judgment of the trial court was contrary to law.

In this connection, the plaintiff argues that this court has recognized the intent of the Legislature regarding privileges of the public schools in State ex rel. Baldwin v. Dorsey, 108 Neb. 134, 187 N. W. 879, as follows: "The decisions of this court uniformly disclose that the school laws have been liberally construed so that all persons of school age without distinction and without discrimination may enjoy public school privileges." It is claimed that the statutes here involved must be

viewed in the light of this pronouncement.

The plaintiff further argues that section 79-490, R. S. Supp., 1955, having to do with pupils, transportation allowance, payment, and when authorized, provides: "When no other means of free transportation is provided to a child attending an elementary school, an allowance for transportation shall be made to the family of such child by the district in which such family resides on the basis of the record of attendance of such child and the number of miles that the child needs to travel, in one round trip each school day, to and from such school as follows: (1) Where a child attends school in his own district and lives more than three miles from the public schoolhouse therein, there shall be paid ten cents per half mile for each one half of a mile or fraction thereof by which the distance of the residence of such child from the schoolhouse exceeds three miles; and (2) where the child is required to attend an elementary school outside of his own district there shall be paid ten cents per half mile for each one half mile or fraction thereof for the distance that the school in the other district is in excess of the distance from the school of his residence. The number of days the child has attended school shall be reported monthly by the teacher to the school board of such public school district; Provided, not more than one allowance shall be made to a family irrespective of the number of children in a family being transported to school. No pupil shall be exempt from school attendance on account of distance from the public schoolhouse."

The plaintiff contends that the foregoing statute covers the instant case in its entirety, for the reason that Gary Schutte was required to attend public elementary school outside the district in which he lived; that the district in which he lived did not furnish the proper facilities for his education; and that the claim of the plaintiff for the payment of transportation of Gary Schutte outside of the school district in which he lived was re-

fused by the local school district and Decker illegally.

The provisions for the education of handicapped children are contained in an independent act under the heading of "Care and Education of Physically Handicapped Children," namely, Chapter 43, article 6, originally passed by the Legislature in 1941, and is hereinafter referred to as the act. This is a special act and deals exclusively and fully with the education of physically handicapped children.

Section 43-607, R. R. S. 1943, provides: "The board of education or board of trustees shall furnish one of the following types of education to the handicapped children who are residents of the school district: (1) Pay the tuition in any district for those handicapped children who are forced to leave the school district temporarily because of treatment, care, or supervision. (2) Provide transportation for those handicapped children within the school district who are physically able to take care of themselves in the regular school, if transportation is provided. (3) Provide visiting teachers for the homebound handicapped child, such teachers to be certified and qualified in the same manner as required for other teachers in Nebraska. (4) Provide correspondence instruction approved by the Superintendent of Public Instruction. (5) Provide any other method of instruction approved by the Superintendent of Public Instruction."

The plaintiff contends that section 43-607, R. R. S. 1943, as above set out, is confusing, therefore it becomes necessary to investigate the legislative intent behind the school laws and to view all of such laws as an integrated whole, so that some sort of orderly scheme may emerge, citing Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409, as follows: "In construing a statute of doubtful meaning courts may consider all statutes on the same subject." See, also, In re Estate of Robinson, 138 Neb. 101, 292 N. W. 48.

The plaintiff further contends that in the light of the

foregoing, if all the laws pertaining to schools and school attendance in Nebraska are to be construed together, the general school laws must be considered along with the provisions relating only to handicapped children; that the provisions relating to handicapped children are merely an adjunct to the general school laws and serve to provide benefits which in some respects supplement the general laws and in some respects replace them; that if the general and special school laws are construed together, it is of no moment that section 43-607, R. R. S. 1943, contains no definite provisions for the payment of transportation of handicapped children going outside the district to attend special schools, because section 79-490, R. S. Supp., 1955, makes provision for the payment of transportation of any child attending an elementary school outside his district; and that no provisos are inserted to qualify the language of this section.

The plaintiff states that all of the sections which were forerunners of section 79-490, R. S. Supp., 1955, contain language to the effect that the act requiring compulsory attendance should not apply to those cases where the child was handicapped and thus incapable of regular school work. But in 1949, in the general revision and codification of the Nebraska school laws, this qualifying language was removed from what is now section 79-490, R. S. Supp., 1955, and section 79-202, R. S. Supp., 1955, is now the only section in the general school laws containing such language.

Section 79-201, R. S. Supp., 1955, relates to compulsory education and the minimum attendance required, and provides in part: "Every person residing in a school district within the State of Nebraska who has legal or actual charge or control of any child, not less than seven nor more than sixteen years of age, shall cause such child to attend regularly the public, private, denominational, or parochial day school for a period of

* * *." Then the days of attendance are set forth, among other things.

Section 79-202, R. S. Supp., 1955, provides: "Section 79-201 shall not apply where the child is physically or mentally incapacitated for the work done in the school, or in any case where the services or earnings of a child, who is fourteen years or more of age, are necessary for his own support or the support of those actually dependent upon him, or when illness or severe weather conditions make attendance impossible or impracticable."

Therefore, the plaintiff asserts, if a student is educable and is attending school, it would appear that section 79-202, R. S. Supp., 1955, would not apply.

Section 79-203, R. R. S. 1943, provides: "In case exemption is claimed on account of mental or physical incapacity, the school board shall have the right to employ a physician or a person skilled in mental diagnosis, who shall examine such child and, if such physician or person skilled in mental diagnosis shall declare that such child is capable of undertaking the work of the schools, then such child shall not be exempt from the requirements of section 79-201."

The plaintiff asserts that the demurrer of the parties admitted that Gary Schutte is educable, therefore he is considered to be subject to compulsory school attendance and governed by the provisions of section 79-201, R. S. Supp., 1955; that the general school laws are applicable to him; and that in considering section 79-203, R. R. S. 1943, it makes no mention of the sort of school a handicapped child must attend but merely states that if a child is capable of undertaking the work of the schools he is subject to compulsory education.

The plaintiff further asserts that what is now section 79-490, R. S. Supp., 1955, was amended in 1949 to apply to all students, the proviso about handicapped children being removed at that time; that the change in the section indicates that the Legislature desired every possible advantage to be accorded to handicapped children

and intended to change the status of handicapped children; and that in such a situation the following is applicable.

In Ledwith v. Bankers Life Ins. Co., *supra,* this court said: "The change in the phraseology of an amendatory statute raises a presumption that a departure from the old law was intended. The Legislature is presumed to know language used in a statute and if a subsequent act on the same or similar subject uses different terms in the same connection the court must presume that a change in the law was intended. Likewise the omission of a word in an amendment of a statute will be assumed to be intentional and for a purpose. Where it is apparent that a substantive portion of a statute has been omitted from an amendment thereof courts have no authority to supply the omission. That would be judicial legislation. The statute should be effectuated as its language warrants."

In School District No. 42 v. Marshall, 160 Neb. 832, 71 N. W. 2d 549, this court said: "We have held that in construing a statute to determine the legislative intent a court may consider the history of its passage, the amendments offered, and action taken by the Legislature thereon." See, also, Placek v. Edstrom, 148 Neb. 79, 26 N. W. 2d 489, 174 A. L. R. 856.

We have no doubt of the applicability of the rules stated in the cited cases as they apply to the issues raised therein, however, we believe that they have no applicability to the issue presented in this appeal and the statutes applicable thereto.

The plaintiff concludes, what could be more natural than for the Legislature, having earlier passed legislation specifically designed to provide educational opportunities for handicapped children, to carefully examine the general school laws and amend them so that the general and specific laws meshed into and formed an integrated pattern for the protection of the handicapped?

We are in accord with the plaintiff that the Legislature

sought to provide educational opportunities to handicapped children at least equivalent to other children attending school. However, we are not in accord with the plaintiff's contention that section 79-490, R. S. Supp., 1955, and other sections of the statutes cited by the plaintiff apply to the instant case for reasons hereafter stated. This court is committed to the following rules in construing statutes.

In construing a statute the legislative intent is to be gathered from the necessity or reason for its enactment, and its several provisions should be construed together, in the light of the general objects and purposes of the act, so as to give effect to the main intent. See Anstine v. State, 137 Neb. 148, 288 N. W. 525.

Where words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning, and no court can read a meaning into a statute that is not warranted by the legislative language, nor can it read the plain, direct, and unambiguous language out of the statute, but words must be given their ordinary meaning and, if possible, the entire statute applied. See Franzen v. Blakley, 155 Neb. 621, 52 N. W. 2d 833.

"Where the language of a statute is plain and unambiguous there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning." Montgomery v. Blazek, 161 Neb. 349, 73 N. W. 2d 402.

Applying these rules to the statutes involved in this appeal, we believe the following to be applicable.

We have heretofore set forth section 43-607, R. R. S. 1943, containing the types of education to be furnished handicapped children. Subdivision (1) under this section we believe to be the only one applicable to the instant case. It applies to the payment of tuition in any district for those handicapped children who are forced to leave the school district temporarily because of treatment, care, or supervision. Subdivision (2) under sec-

tion 43-607, R. R. S. 1943, relates to transportation for those handicapped children within the school district who are physically able to take care of themselves in the regular school if transportation is provided. We need not specifically concern ourselves with the other matters set forth in said section.

The obligations of the school district are specifically set out in section 43-607, R. R. S. 1943, and section 43-609, R. S. Supp., 1955. The latter section provides as follows: "The school board of a school district, wherein handicapped children reside, shall include in its annual budget for each child not less than the regular per pupil cost in the school of the district. When an amount equal to the regular per pupil cost has been spent for the education and care of the handicapped child, the school district qualifies for excess cost reimbursement payable by the state; Provided, that the education and care shall have been secured within the State of Nebraska. This excess cost reimbursement is made to the local school district for the education of both physically handicapped and educable mentally handicapped children. The excess costs, payable by the state for the education and care of these children, shall be determined by the State Board of Education; Provided, that the amount of state funds for the education and care of these children shall not exceed the following amounts per annum: (1) Physically handicapped children, four hundred dollars per pupil, and (2) educable mentally handicapped children, two hundred dollars per pupil."

This section clearly discloses the intention of the Legislature to be that such a handicapped child should have spent on him by the school district an equal amount with other children. If it had been intended that the school district should stand all of the expense of such child's education or all of the expenses in excess of the $400 provided by the state, obviously it would have so stated. In any event, the Legislature has defined the limit and extent of the school district's and state's

liability for the education of such children. If the Legislature intended the expense of transportation or a temporary residence should be paid for by the district or the state, it would have so provided in certain and definite language as it did for the education of deaf-blind children. See § 43-601, R. R. S. 1943. What the Legislature intended to do was to limit the transportation of handicapped children to the confines of the local school district.

Section 79-490, R. S. Supp., 1955, merely provides for transportation in certain cases where a pupil has transferred to a school outside of his district. This section was first passed by the Legislature in 1927, and the law for the education of handicapped children was passed in 1941. It is obvious that the two sections are separate and distinct in application and meaning. Section 79-490, R. S. Supp., 1955, was last amended in 1955, but still no provision was made for the transportation of handicapped children. If the Legislature had seen fit to do so, it would have included such a provision.

It will be noted that in cases where there is a transfer from one school district to another, the local school board has some rights in the matter and may decide under what conditions a pupil may attend a school outside the district of his residence. With reference to a handicapped child, the school district of his residence is not privileged, nor has it the right, to select his school nor the type of education to be furnished him.

When a school board such as the one that comprises consolidated district No. 90 has complied with section 43-609, R. S. Supp., 1955, it has met its obligations, and there is no obligation or funds available for the payment of transportation for a handicapped child such as Gary Schutte in the instant case. When the state has paid out the $400 as set forth in said section of the statute it has met its obligation.

The act heretofore referred to, relating to the education of handicapped children, is an independent act

dealing exclusively and fully with the education of physically handicapped children and is the only act pertinent to the issue raised in the instant case and governs such issue. We hold that school district No. 90, Webster County, and the school board of such district are not liable for transportation expenses of Gary Schutte, a physically handicapped child, for attendance at a special school outside of said school district.

We conclude that the trial court did not err in sustaining defendant Decker's motion to dismiss and in sustaining the other defendants' demurrer, and its judgment in so doing should be, and is hereby, affirmed.

AFFIRMED.

HERMAN KELLE ET AL., APPELLANTS, V. CRAB ORCHARD RURAL FIRE PROTECTION DISTRICT ET AL., APPELLEES.
83 N. W. 2d 51

Filed May 10, 1957. No. 34132.

1. **Fire Protection Districts.** The general rule is that nonjurisdictional irregularities and defects in the formation of rural fire protection districts can be challenged only in direct proceedings to test the validity of their organization, but if they are of such a character that the proceedings are in fact void then that fact may be shown in any action.
2. ———. Rural fire protection districts may be collaterally attacked when the defects complained of are jurisdictional and not merely irregularities.
3. ———. The character and qualifications of persons by whom a petition is to be signed, and the number or proportion of such persons whose signatures must be attached to the petition, are ordinarily prescribed by the statutes which provide for the presentation of the petition and compliance with such requirements is essential to the validity of the petition.
4. **Names.** In law the name of a person consists of one given name and one surname and the two, using the given name first and the surname last, constitute such person's legal name.
5. ———. A married woman's name consists, in law, of her own Christian name and her husband's surname, marriage conferring on her the surname of the husband.

APPEAL from the district court for Johnson County: VIRGIL FALLOON, JUDGE. *Affirmed.*

Ginsburg, Rosenberg & Ginsburg and *Philip F. Nestor*, for appellants.

Raymond B. Morrissey and *Homer L. Kyle*, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for Johnson County. It involves an action whereby four resident freeholders of the area covered by Crab Orchard Rural Fire Protection District of Johnson County, Nebraska, and who have real and personal property located therein that would be liable for taxes if levied to operate and maintain it, seek to enjoin the district, and its officers and directors, from exercising the statutory duties and functions of a legally created rural fire protection district. The relief sought is grounded on a claim that the petition initially filed in the office of the county clerk of Johnson County for the formation thereof was legally insufficient. The trial court found generally for the defendants and dismissed plaintiffs' petition. Their motion for new trial having been overruled, the plaintiffs perfected this appeal.

Appellee Crab Orchard Rural Fire Protection District, which we shall hereinafter refer to as the district, was organized under and pursuant to the authority of Chapter 35, article 5, R. R. S. 1943, which article relates to the subject of "Rural Fire Protection Districts." The action is in the nature of a collateral attack seeking injunctive relief because of alleged jurisdictional defects in the procedural steps leading up to the formation of the district. Rural fire protection districts may be collaterally attacked when the defects complained of are jurisdictional and not merely irregularities. Prucka v.

Eastern Sarpy Drainage Dist., 157 Neb. 284, 59 N. W. 2d 761; Chicago & N. W. Ry. Co. v. Payne Creek Drainage Dist., 148 Neb. 139, 26 N. W. 2d 607.

The general rule is that nonjurisdictional irregularities and defects in the formation of a district, such as a rural fire protection district, can be challenged only in a direct proceeding to test the validity of its organization, but if they are of such a character that the proceedings are in fact void then that fact may be shown in any action. See, Cacek v. Munson, 160 Neb. 187, 69 N. W. 2d 692; Prucka v. Eastern Sarpy Drainage Dist., *supra;* Chicago & N. W. Ry. Co. v. Payne Creek Drainage Dist., *supra.*

As stated in Cacek v. Munson, *supra,* quoting from 33 C. J., Judgments, § 39, p. 1078: " 'Want of jurisdiction must be distinguished from error in the exercise of jurisdiction. Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked.' "

The provisions of Chapter 35, article 5, R. R. S. 1943, insofar as material to the issues herein raised, provide:

"* * * sixty per cent of the freeholders residing in any territory in the State of Nebraska, equivalent in area to one township or more situated outside the corporate limits of any city or village, are hereby authorized and empowered to initiate the formation of rural fire protection districts * * *." § 35-502, R. R. S. 1943.

"Whenever sixty per cent of the freeholders residing in any rural territory, equivalent in area to one township or more, elects to form, organize, establish, equip, and maintain a rural fire protection district, they shall signify such intention by presenting to the county clerk of the county or counties in which such territory is situated, a petition setting forth the desires and purposes of

such petitioners. Such petition shall contain the full names and post-office addresses of such petitioners, * * *." § 35-503, R. R. S. 1943.

"Upon the filing of such petition in the office of the county clerk, the county clerk shall determine and certify that such petition has been signed by at least sixty per cent of the freeholders whose names appear on the current tax schedules in the office of the county assessor and who appear to reside within the suggested boundaries of the proposed district. He shall thereafter designate a time and place for said petition to be heard by the county board. Notice of such hearing shall be given by publication two weeks in a newspaper of general circulation in the county, the last publication appearing at least seven days prior to said hearing; said notice shall be addressed to 'all persons residing in or having any interest in real or personal property located within the following boundaries' and shall include a statement of the proposed boundaries as set forth in the petition; * * *." § 35-504, R. R. S. 1943.

The petition for the formation of the district was filed in the office of appellee Wayne C. McCoy, the then duly elected, qualified, and acting county clerk for Johnson County, on March 26, 1955. He thereafter, on March 28, 1955, transmitted the petition to the board of county commissioners of Johnson County, certifying that he had "examined the signatures affixed to said petition" and "determined that the persons signing said petition comprise more than sixty percent of the freeholders residing within the boundaries of the proposed district." He therein also designated a time and place for said petition to be heard by the county board and caused proper notice thereof to be published in the Tecumseh Chieftain, a newspaper of general circulation in Johnson County.

In Morse v. City of Omaha, 67 Neb. 426, 93 N. W. 734, we quoted the following: " 'The determination of a township board that a majority of the property holders have signed a petition for a local improvement is not

conclusive, and, in the absence of statutory provisions to the contrary, the question may be investigated in a collateral proceeding.' (Auditor General v. Fisher, 47 N. W. Rep. [Mich.] 574.)"

However, in Majerus v. School Dist. No. 52, 139 Neb. 823, 299 N. W. 178, we said: "The law presumes official acts of public officers, in a collateral attack thereon, to have been done rightly, and with authority, in the absence of evidence to the contrary, and, in such a collateral attack, acts done, which presuppose the existence of other acts to make them legally effective, are presumptive proof of the existence of such other acts." See, also, School Dist. No. 49 v. School Dist. No. 65-R, 159 Neb. 262, 66 N. W. 2d 561.

We said in Olsen v. Grosshans, 160 Neb. 543, 71 N. W. 2d 90, quoting from 78 C. J. S., Schools and School Districts, § 37, p. 703, that: " 'The character and qualifications of the persons by whom a petition is to be signed, and the number or proportion of such persons whose signatures must be attached to the position (petition), ordinarily are prescribed by the statutes which provide for the presentation of the petition, and compliance with such requirements is essential to the validity of the petition.' "

From a careful reading of the foregoing quoted statutory provisions it becomes self-evident that the jurisdictional requirements of a petition, in order to give the county clerk authority to proceed and designate a time and place for said petition to be heard by the county board and to cause a notice thereof to be published, are that 60 percent of the freeholders residing within the area of the proposed district have signed it. In the absence thereof the petition would be insufficient and the county clerk without authority to act. See, State ex rel. Larson v. Morrison, 155 Neb. 309, 51 N. W. 2d 626; Morse v. City of Omaha, *supra*. We think the record establishes that 60 percent of the freeholders residing in the pro-

posed district signed the petition before it was filed with the county clerk on March 26, 1955.

But appellants contend that 60 percent of the freeholders residing in the area of the district did not sign their "full names" to the petition nor give their "post-office addresses," as section 35-503, R. R. S. 1943, provides they shall. It is established by the evidence adduced that some 23 of those signing the petition did not do so with their full names nor, in many instances (38), were the addresses given complete and, in a few instances (6), no addresses were given.

In Enewold v. Olsen, 39 Neb. 59, 57 N. W. 765, 42 Am. S. R. 557, 22 L. R. A. 573, we said: "In law, the name of a person consists of one given name and one surname, the two, using the given name first and the surname last, constitute such person's legal name; * * *." See, also, McCabe v. Equitable Land Co., 88 Neb. 453, 129 N. W. 1018; Butler v. Smith, 84 Neb. 78, 120 N. W. 1106, 28 L. R. A. N. S. 436; 65 C. J. S., Names, § 3a, p. 2.

And, as stated in 38 Am. Jur., Name, § 10, p. 600: "A married woman's name consists, in law, of her own Christian name and her husband's surname, marriage conferring on her the surname of the husband. Her correct first name is her maiden Christian name, and not the Christian name of her husband."

We do not think the requirements that those signing a petition do so with their "full names" and give their "post-office addresses" are jurisdictional as relating to their character or qualifications but rather for the purpose of identification and to assist the county clerk in making a determination as to whether or not 60 percent of the freeholders residing in the area proposed as a district have actually signed the petition filed with him for that purpose. In view thereof these deficiencies are merely irregularities and, as such, not a basis for declaring the organization of the district void.

There is one further question raised by appellants that needs to be considered. Most of the signatures on

the petition were obtained thereto in 1954. Then, in the early part of 1955, Keith Lynch submitted the petition to Wayne C. McCoy, the county clerk, and asked him to check it to see if there were sufficient signatures thereon to meet the statutory requirements relating thereto. Lynch did not ask McCoy to file the petition and McCoy did not do so. McCoy took about a week to check the signatures on the petition and then advised Lynch he did not have enough signers. Lynch thereupon took the petition and between March 4 and 12, 1955, 16 additional signatures were added thereto. Lynch then filed the petition in the office of the county clerk on March 26, 1955. We find nothing wrong with this procedure. It seems to us a very practical thing to do and one that avoided the necessity of securing and filing another petition since more than 60 percent of the resident freeholders of the area were actually interested in forming the district. If the petition had been submitted to and filed by the county clerk in the first instance then it is possible that what we said in Ayres v. Moan, 34 Neb. 210, 51 N. W. 830, 15 L. R. A. 501, would apply.

In view of what we have herein held we think the trial court was correct in dismissing the petition. We therefore affirm its judgment doing so.

AFFIRMED.

DWAYNE D. ANDERSON, BY ALVA H. ANDERSON, HIS FATHER AND NEXT FRIEND, APPELLEE, V. LLOYD L. EVANS ET AL., APPELLANTS.

83 N. W. 2d 59

Filed May 10, 1957. No. 34147.

1. **Partnership.** A partnership is the creature of a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions.
2. **Joint Adventures.** A joint adventure is in the nature of a partnership, but may exist where persons embark on an under-

taking without entering on the prosecution of a business as partners strictly but engage in a common enterprise for their mutual benefit.

3. ———. To constitute a joint adventure, there must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control over the agencies used therein, though one party may entrust performance to another.
4. **Trial.** In determining the question of whether or not a motion of a defendant for a directed verdict or for judgment notwithstanding the verdict should be sustained the court is required to consider the evidence in the light most favorable to the plaintiff and to resolve every controverted fact in his favor, and he should have the benefit of every inference that can reasonably be deduced therefrom.
5. ———. No proof is required as to the existence of a fact admitted by the pleadings.
6. **Master and Servant: Negligence.** A servant cannot recover from a master where he has subjected himself to manifest and inevitable danger which danger cannot be avoided by the exercise of ordinary care and skill, even if commanded by the master to incur the risk.
7. ———: ———. If a master orders a servant into a place of danger and the servant is injured, the servant is not guilty of contributory negligence unless the danger is so glaring that a reasonably prudent person would not have entered into it.
8. ———: ———. An employee who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is chargeable with negligence or contributory negligence.
9. ———: ———. An employee assumes risks not ordinarily incident to his employment, provided he knows them and appreciates the danger, or provided they are so plainly observable that he must be presumed to know them and to appreciate the danger.
10. ———: ———. Where there is a disputed question of fact as to whether or not an employee was informed or had knowledge of latent dangers of his employment a question is presented for determination by a jury.
11. **Master and Servant: Infants.** Liability or nonliability in an instance where an infant is ordered into a dangerous situation by his employer does not depend upon presumption but upon knowledge and prudent action in relation thereto by the employee.
12. **Evidence.** The official charts and records, kept in the regular

course of business under the rules of a hospital, are admissible in evidence when a proper foundation has been laid.

13. ———. As limited in the opinion, the notes and entries by a nurse relating to care, treatment, and observation of patients in a hospital do not come within the purview of section 25-12,109, R. R. S. 1943.

14. ———. Color photographs showing the physical condition of a plaintiff where his condition is an issue are admissible in evidence.

15. Trial. The giving of oral instructions to a jury in regard to the principles of law applicable to the case and the evidence, in the absence of waiver of written instructions, is reversible error.

APPEAL from the district court for Holt County: DAYTON R. MOUNTS, JUDGE. *Reversed and remanded with directions.*

Max Kier and *Charles Ledwith,* for appellants.

Eisenstatt, Seminara & Lay and *Julius D. Cronin,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action in two causes of action for damages for personal injuries and for medical and hospital expenses instituted by Dwayne D. Anderson, a minor, by Alva H. Anderson, his father and next friend, plaintiff and appellee, against Lloyd L. Evans and Edrie Evans, defendants and appellants. The defendants are husband and wife but their liabilities, if any, in this action are not dependent upon the marriage relation but upon an alleged contract of employment whereby the defendants were bound as partners or persons engaged in a joint adventure.

The action was tried to a jury. A verdict was returned in favor of plaintiff and against the defendants for $10,000 upon which verdict judgment was rendered. The defendants separately filed motions for judgment notwithstanding the verdict or in the alternative for a new trial. These were overruled, whereupon the

defendants perfected an appeal to this court wherein they seek reversal of the action of the district court.

An understanding of the matters presented here for consideration requires an outline of the pertinent matters presented by the pleadings and the evidence.

By the petition it is alleged that plaintiff, a minor of the age of 18 years, was on August 5, 1953, employed by the defendants under an oral contract of employment to work on defendants' ranch as a ranch hand; that his employment commenced on August 6, 1953; that on that day plaintiff assisted the defendant Lloyd L. Evans, who will be hereinafter referred to as Lloyd, in removing a stake from a point near the rear end of a pick-up truck; that prior thereto Lloyd had poured fuel on the stake which he had ignited; that he knew of the high explosive and dangerous qualities of the fuel but failed to inform the plaintiff who because of youth and inexperience did not know of these qualities; that Lloyd directed plaintiff and commanded the plaintiff to pour additional oil on the stake; and that in an attempt to comply plaintiff picked up a can of fuel, in consequence of which the can of fuel exploded and plaintiff was severely burned and injured. He alleged in numerous specifications that Lloyd was negligent. A sufficient summary of the specifications is that he was negligent in commanding and directing the plaintiff to pour fuel on the burning stake the hazard and danger of which was known to Lloyd or should have been known to him but which on account of his age and inexperience was unknown to the plaintiff.

By answer the oral contract of employment by plaintiff with Lloyd was admitted but as to the defendant Edrie Evans, who will hereinafter be referred to as Edrie, the contract was denied. The original application of fuel to the stake and that it was lighted was admitted. It was in substance admitted that the fuel had inflammable and explosive qualities which entailed danger when used as was done by plaintiff when the

explosion of which plaintiff complains came about. It was denied that the application was made at any request or direction of Lloyd but that it was done contrary to his express direction and without his knowledge. It was alleged that by reason of age and experience the plaintiff was aware and informed of the dangers incident to the use of the fuel in the manner in which he used it, and in consequence thereof he assumed the risk of his act and was guilty of negligence proximately causing the explosion and his injury and damage.

This résumé of the pleadings has application to both causes of action, the first of which is for damage to plaintiff for his injuries. The second is for medical and hospital expense for which the father was liable and which was assigned to plaintiff.

There are eight assignments of error by which it is urged that the judgment may not be allowed to stand. One of these relates to the question of whether or not on the record Edrie Evans was a party to the oral contract of employment.

On the record and the decisions of this court the only conclusion which may be arrived at is that the assignment is valid and must be sustained. There is no evidence whatever in the record which directly or by reasonable inference proves a partnership or anything in the true nature of a joint adventure between the two defendants or that Edrie was a party to the oral employment agreement.

As to the employment agreement all she did was to accompany the plaintiff to the field where plaintiff and Lloyd entered into it.

As to the existence of a partnership this court has said: "Partnership is a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions." Peterson v. Massey, 155 Neb. 829, 53 N. W. 2d 912.

In the same case, as to joint adventure, it was said: "A joint adventure is in the nature of a partnership, but may exist where persons embark on an undertaking without entering on the prosecution of a business as partners strictly but engage in a common enterprise for their mutual benefit."

Again in the same case as to the creation of a joint adventure, it was said: "To constitute joint adventure, there must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control over the agencies used therein, though one party may entrust performance to another."

In that case, as to proof of the existence of either a partnership or of a joint adventure, it was said: "The burden of establishing the existence of either a joint enterprise or a partnership is upon the party asserting that the relationship exists."

The total substance of the evidence relating to partnership or joint adventure is that Lloyd was engaged in farming partly on land owned by him, partly on land held in joint tenancy with Edrie, and partly on rented land; that they had a joint bank account; and that they talked over the matters relating to the farming operations. There is no word of evidence supporting the existence of any kind or character of contractual arrangement.

By the first, second, and eighth assignments of error it is urged for reasons made apparent by the record that on the evidence and the law there was no basis for a recovery by plaintiff.

Separate motions for directed verdict were made by the defendants at the close of plaintiff's evidence and again at the close of all the evidence. Separate motions for new trial and for judgment notwithstanding the verdict were also made. These motions challenged the

sufficiency of the evidence to sustain a verdict in favor of plaintiff. All of these were overruled. The defendants effectually by these three assignments of error contend that they should have been sustained, and in consequence thereof they are entitled to a reversal of the judgment with direction to the district court to render judgment in their favor.

In the determination of this question this court is required to consider the evidence in the light most favorable to the plaintiff and to resolve every controverted fact in his favor, and he should have the benefit of every inference that can reasonably be deduced therefrom. Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367.

At the close of plaintiff's evidence no testimony had been adduced to describe the contents of the container, which was a 5-gallon can used for the purpose of conveying and pouring tractor fuel into a farm tractor, from which the plaintiff attempted to pour the fuel from which the explosion, about which there is no controversy, resulted. Likewise there was no evidence as to its volatility or its explosive potential when it came in contact with or proximity to fire or otherwise. The plaintiff however pleaded sufficient facts showing that it was highly volatile and dangerously explosive when brought into contact with or close proximity to fire.

The defendants substantially admitted by answer that the can contained tractor fuel having the qualities described by plaintiff in his petition. It must be said therefore that although there was no evidentiary proof that the fuel used as it was had the potential claimed for it by plaintiff the potential did, as claimed, exist.

The applicable rule in this instance is the following: "No proof is required as to the existence of a fact admitted by the pleadings." Faulhaber v. Griswold, 124 Neb. 357, 246 N. W. 727. See, also, Barkalow Bros. v. English, 159 Neb. 407, 67 N. W. 2d 336; Rodgers v. Jorgensen, 159 Neb. 485, 67 N. W. 2d 770.

The plaintiff testified that he proceeded to pour the

motor fuel by order and direction of Lloyd. This is denied by Lloyd and to the contrary he testified that he directed the plaintiff not to do so. Under the rules set out herein this court, for present purposes, must accept the version of the plaintiff.

A further substantial contention of the defendants is that even if Lloyd did direct the plaintiff to pour the fuel, still he may not recover for the reason that in doing so he was guilty of contributory negligence, and also that he assumed the risk of his own act. The basis of this contention as it has been stated by defendants in their brief is as follows: "It is presumed that an 18-year-old boy who has studied auto mechanics in school, owned, operated and repaired four automobiles, operated farm tractors, refueled farm tractors, and who had been employed in haying operations with mechanized equipment for three or more summers, must know and appreciate the dangers in the use of tractor fuel, gasoline and motor fuels generally, including their explosive character and the danger which would ensue from pouring them on a fire or exposing them to fire."

If the contention of defendants is to be sustained it must be sustained on the basis of this proposed presumption and contrary to the direct testimony of the plaintiff. He testified that he did not know of the dangers incident to such handling as he said was directed.

Attention has not been called to any case in this jurisdiction the effect of which is to employ a presumption such as is proposed to defeat the right of trial to a jury under conditions like or similar to those presented by the record in this case. In none of the cases to which attention has been directed has a declaration been found the effect of which is to say that a person who precipitates under direction of an employer dangers which are in their nature hidden, which dangers may not by the exercise of ordinary care be immediately recognized by the senses, although the dangers are inherent and

generally known and recognizable, is guilty of contributory negligence, or that he has assumed the risk of his act, in the absence of evidence that he knew or in the exercise of ordinary care should have known of the dangers.

It was said in a case where an infant of the age of 14 years was involved: "The servant can not fly in the face of the manifest and inevitable danger—danger that can not be avoided, even by the exercise of ordinary care and skill—even though he be commanded by his master to incur the risk; and if he does so he can not recover." Ittner Brick Co. v. Killian, 67 Neb. 589, 93 N. W. 951.

In the opinion in this case Shortel v. City of St. Joseph, 104 Mo. 114, 16 S. W. 397, 24 Am. S. R. 317, was referred to as supporting this statement. In that case it was said: "If, therefore, the master orders the servant into a place of danger, and the servant is injured, he is not guilty of contributory negligence, unless the danger was so glaring that a reasonably prudent person would not have entered into it." This statement discloses a purpose to say that liability or nonliability in an instance where an infant is ordered into a dangerous situation by his employer does not depend upon presumption but knowledge and prudent action in relation thereto by the employee. This is the attitude which has been manifested by the decisions of this court.

This court, in Norfolk Beet-Sugar Co. v. Hight, 56 Neb. 162, 76 N. W. 566, quoted with approval the following from Jones v. Florence Mining Co., 66 Wis. 268, 28 N. W. 207, 57 Am. R. 269: "We think it is now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the

dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them, and do his work safely, with proper care on his part." There has been no departure in the decisions from this pronouncement.

Directly on the question of presumption as it relates to a minor this court, in Collins v. Weise, 110 Neb. 552, 194 N. W. 450, said: "There is no presumption that a boy 16 years of age, who has had little experience as a farm laborer, has as much prudence and understanding as an adult, and where such youth is injured while engaged in dangerous work, which he was ordered to do by his employer's foreman in charge of the work, it is for the jury to say, considering his age and experience, whether he assumed the risks of such employment." This pronouncement has not been modified by later decisions.

It is of course true that an employee who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is chargeable with negligence or contributory negligence. Groat v. Clausen, 139 Neb. 689, 298 N. W. 563; Ring v. Kruse, 158 Neb. 1, 62 N. W. 2d 279.

Also as said in Corley v. Hubbard, 129 Neb. 38, 260 N. W. 551: "An employee assumes risks not ordinarily incident to his employment, provided he knows of them and appreciates the danger, or provided they are so plainly observable that he must be presumed to know them and to appreciate the danger." See, also, Groat v. Clausen, *supra*.

Where however there is a disputed question of fact as to whether or not the employee was informed or had knowledge of the latent dangers of his employment a question is presented for determination by a jury.

Gundy v. Nye-Schneider-Fowler Co., 89 Neb. 599, 131 N. W. 964; Collins v. Weise, *supra.*

In the light of these observations it is concluded that the district court did not err in refusing to sustain the contentions embraced in the first two and the eighth assignments of error.

By the third assignment of error the defendants urge that the court erred in excluding testimony as to what knowledge is commonly possessed of the explosive properties of tractor fuel by persons of similar age to the plaintiff. A sufficient response to this is that it does not appear that any such offer of evidence was made. The only thing that appears in this connection is two questions asked of Ralph Fuqua, who was 22 years of age, by defendants' attorney and similar questions asked of one John Anderson. The questions asked of Fuqua were: "Q. You know enough not to pour gas on a fire, don't you?" "Q. Mr. Fuqua, do you know it is not safe to pour gasoline or tractor fuel on a fire?" The questions were objected to on the ground that they were not proper cross-examination and had no bearing on the issues. The objections were sustained.

By the fourth assignment of error it is contended that the court erred in admitting into evidence hospital records containing opinions of nurses as to pain and suffering of the patient. It is to be observed that by this assignment the admissibility of hospital records generally is not brought into question. It is directed only to admissibility of opinions of nurses as to pain and suffering of the patient contained in the hospital records. The discussion here will be so limited.

Voluminous hospital records from the Nebraska Methodist Hospital in Omaha, Nebraska, were admitted in evidence over objections of the defendants. Among these were notes purportedly made by nurses. Approximately ten pages from these notes covering a period from August 7, 1953, to August 18, 1953, were

read to the jury. Apparently there was much more of this character of evidence which the jury was probably permitted to take to the jury room.

The only foundation for the receipt of these notes in evidence was laid by the then assistant medical record librarian of the hospital. She testified that they were the normal, regular business records maintained by the hospital concerning plaintiff; that after proper service to the patient they were assembled in the record office; that her office only assembled the records; that they are compiled on the floors and do not come to the record office until the patient is dismissed; and that they were kept in the ordinary course of business. There is nothing whatever in the testimony of the witness to identify the person or persons who made the notes or to verify their authenticity.

As to admissibility this court has said: "The official charts and records, kept in the regular course of business under the rules of a reputable hospital, are admissible in evidence when a proper foundation has been laid." Willis v. Order of Railroad Telegraphers, 139 Neb. 46, 296 N. W. 443.

In that case there was no holding that statements of the condition of a patient appearing on hospital charts were not hearsay. The point of the holding in that connection was that the plaintiff, the widow of a deceased person, had in her proof of death in a claim for insurance waived the right to assert inadmissibility on the ground of hearsay.

The admissibility generally of hospital records, in the absence of statutes, is commented upon in the opinion. In the comments it was pointed out that there is great conflict of opinion in other jurisdictions as to admissibility of hospital records in evidence. However no precedent was announced therein for this jurisdiction. It was indicated only that they were not admissible without foundation.

In other jurisdictions the question of foundation has

been considered and views expressed. In the expressions there is no uniformity of language but a summary of the substance appears to be that before hospital records become admissible at least the following must be shown: The custody from which they come; that they were prepared in due process of hospital work; the identity of the person who made them; the manner in which the person or persons making them obtained the information recorded; information as to accuracy; identification of the records by the person or persons who made them; and if such person or persons are unavailable, the reasons therefor. See, Osborne v. Grand Trunk Ry. Co., 87 Vt. 104, 88 A. 512, Ann. Cas. 1916C 74; Clayton v. Metropolitan Life Ins. Co., 96 Utah 331, 85 P. 2d 819, 120 A. L. R. 1117.

This appears to be a proper general rule to be observed in situations such as the one being considered here. The record in this case discloses no such foundation.

The plaintiff contends however that these notes were admissible under a statute which is designated as the Uniform Business Records As Evidence Act. Section 25-12,109, R. R. S. 1943, is as follows: "A record of an act, condition, or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies as to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission." It is on this provision that the plaintiff relies.

It is apparent, assuming that the notes in question could be regarded as business records, that the foundation for admission in evidence required by the terms of the statute was never laid. As to this no further comment is required.

In the light of what has been said as to the purpose and meaning of the statute these notes were not business

records. In Higgins v. Loup River Public Power Dist., 159 Neb. 549, 68 N. W. 2d 170, it was pointed out that the record of the acts and incidents of employees in the performance of duties as such do not come within the purview of this statute. In that case it was said: "The phrase regular course of business as used in the act must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as such. If a record is not of such a character as to give it the status of a business entry it is hearsay and is inadmissible."

The record of these notes was not admissible. The admission of them was error as contended by the defendants.

By the fifth assignment of error the defendants contend that the court erred in admitting into evidence photographs showing the physical appearance of plaintiff after the accident. These photographs were in color. The substantial theory of the assignment is not that the photographs did not reflect the appearance of the plaintiff at the time, but that there was other descriptive evidence of his condition and appearance which rendered unnecessary this evidence, and in this light the evidence should not have been admitted because it was calculated only to create prejudice against the defendants.

In the light of the decisions the assignment of error may not be sustained. In City of Geneva v. Burnett, 65 Neb. 464, 91 N. W. 275, 101 Am. S. R. 628, 58 L. R. A. 287, it was said: "Under the proper precautions and with necessary explanations, what are known as 'X-ray pictures' are admissible in evidence for the purpose of showing the condition of the internal tissues of the body." This pronouncement was referred to with approval in Fries v. Goldsby, 163 Neb. 424, 80 N. W. 2d 171.

If this is true as to internal tissues it would reasonably appear that photographs showing the condition of the external tissues should likewise be admissible. The possibility that the photographs might have a tendency

to create sympathy in favor of one party should not render them inadmissible as proof of an issue on the trial.

The sixth assignment of error requires no consideration at this point. It was effectually disposed of by the conclusion already appearing herein that no cause of action has been proved against Edrie.

By the seventh assignment of error the defendants contend that the court in effect orally gave instruction to the jury and that this was error.

The court did out of the presence of the parties or their attorneys orally instruct the jury as to the manner of preparing a verdict, as to the intent of the court as to the content of a form of a verdict in blank supplied, and the effect of it with the blank or blanks filled out and returned by the jury. This obviously was reversible error.

Section 25-1111, R. R. S. 1943, provides: "It shall be the duty of the judges of the several district courts, in all cases, both civil and criminal, to reduce their charges or instructions to the jury to writing, before giving the same to the jury, unless the so giving of the same is waived by the counsel in the case in open court, and so entered in the record of said case; * * *."

Section 25-1115, R. R. S. 1943, provides: "No oral explanation of any instruction authorized by the preceding sections shall, in any case, be allowed, and any instruction or charge, or any portion of a charge or instructions, given to the jury by the court and not reduced to writing, as aforesaid, or a neglect or refusal on the part of the court to perform any duty enjoined by the preceding sections, shall be error in the trial of the case, and sufficient cause for the reversal of the judgment rendered therein."

In Dow v. Legg, 120 Neb. 271, 231 N. W. 747, 74 A. L. R. 5, it was said: "The giving of an oral instruction to the jury in regard to the principles of law applicable to the case and to the evidence, without waiver of the

statutory requirement that it be in writing, is reversible error."

In the light of these observations the judgment of the district court is reversed. As to the defendant Edrie Evans the cause is remanded with directions to sustain her motion for judgment notwithstanding the verdict. As to the defendant Lloyd L. Evans, it is remanded for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

DARREL F. PARKER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
83 N. W. 2d 347

Filed May 17, 1957. No. 34091.

1. **Criminal Law: Evidence.** In a criminal trial a confession of guilt alleged to have been made by the defendant is not competent in evidence, unless first shown to have been voluntarily made.
2. ———: ———. In laying the foundation for the determination of whether or not a confession was voluntarily made the evidence to establish foundation must be taken out of the presence of the jury, if there is objection to taking it in the presence of the jury.
3. ———: ———. As a basis for the receipt of a confession in evidence the State is required to adduce evidence that the confession was voluntary. Witnesses of the State on this question may be cross-examined and the defendant has the right to adduce countervailing evidence.
4. ———: ———. A confession is admissible if the affirmative evidence shows that it was voluntarily made and that the evidence excludes any other hypothesis.
5. ———: ———. In laying a foundation in a criminal case for the admission of a confession in evidence, it is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats.
6. ———: ———. The question of whether or not in the first instance the State has laid a proper and sufficient foundation

for the admission of such evidence is one of law for the court, and if the court determines as a matter of law that no sufficient foundation has been laid then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still a question of fact for the jury.

7. ———: ———. Where separate confessions have been made each dependent on a separate foundation, admissibility depends upon the separate foundations.

8. **Homicide: Evidence.** Ordinarily evidence of conduct, acts, and utterances of a deceased person unrelated to a homicidal act and unconnected therewith is irrelevant and inadmissible in evidence.

9. ———: ———. The admission of evidence of conduct, acts, and utterances of a deceased person unrelated to a homicidal act and unconnected therewith is ordinarily error, but if it appears that the rights of the defendant were not prejudiced thereby the error may not be regarded as ground for reversal.

10. **Criminal Law: Evidence.** It is ordinarily within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting.

11. ———: ———. In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce evidence in its possession for inspection by the defendant's counsel before trial.

12. **Evidence.** The polygraph, commonly known as a lie detector, used for determining the truthfulness of testimony has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory.

13. **Trial: Appeal and Error.** When on direct examination an objection to a question is interposed by the adverse party and sustained, there must be an offer of proof of the facts sought to be put in evidence by the question in order to present the ruling to this court for review.

14. **Appeal and Error.** To make error in a trial available for a reversal in the appellate court it should be called to the attention of the district court and be affirmatively shown on the record for review.

15. **Trial.** In a case where counsel for the State referred in argument to the jury to facts not in evidence, and on objection that the statements were unwarranted by the evidence the court instructed the jury to disregard such statements, there was left no ground for complaint, for the reason that the court, when appealed to, granted all relief requested.

16. **Trial: Appeal and Error.** The provisions of section 29-2103,

R. R. S. 1943, are mandatory and a motion for new trial in a criminal action must be filed within 10 days after the verdict is rendered in order to be considered on appeal, except for the cause of newly discovered evidence or unless the defendant was unavoidably prevented from filing the motion within 10 days.

ERROR to the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed.*

Kenneth R. Cook, Edgar E. Cook, William Drake, Max G. Towle, and *Thomas J. McManus,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is a criminal action wherein, in the district court for Lancaster County, Nebraska, Darrel F. Parker was charged with the crime of first degree murder. The action was prosecuted in the name of the State of Nebraska by the county attorney. On a trial of the case Parker was convicted of the charge and was sentenced to a term of life imprisonment in the State Penitentiary. A motion for new trial was filed which was overruled. By petition in error filed in this court he seeks a reversal of the conviction and sentence. He will hereinafter be referred to as the defendant.

Numerous alleged errors are assigned which the defendant insists are grounds for reversal. A question which is basic in the determination of the question of whether or not reversible error is present is advanced collectively by the first three assignments of error. This question relates to the admissibility in evidence of confessions. The three therefore will receive collective rather than separate consideration. The consideration of them requires a brief informative background.

On and for some time prior to December 14, 1955, the defendant with his wife, Nancy Parker, lived in a house

at 3200 Sumner Street, Lincoln, Nebraska. Some time before 12 o'clock noon of December 14, 1955, Nancy Parker came to her death at that address. Her death was reported by the defendant a few minutes after 12 o'clock noon. She had apparently been struck in the face. When she was found cords were tied around her throat and her hands had been tied behind her back with cords. Handkerchiefs had been placed in her mouth. The immediate cause of death was strangulation.

The funeral was held in Des Moines, Iowa. The defendant attended the funeral and thereafter until December 21, 1955, remained in that city. On December 20, 1955, the county attorney of Lancaster County, Nebraska, called the defendant and asked him to return to Lincoln, Nebraska, to aid in the investigation of the death of Nancy Parker. He was asked to report to the headquarters of the Nebraska Safety Patrol. He reported as requested on December 21, 1955, at about 11:30 a.m. At about 11:45 a.m. he met one John E. Reid in a room at the Safety Patrol headquarters where he was interviewed by Reid. This interview lasted until about 2:45 p.m. Thereafter he remained at the headquarters until about 6:30 p.m. when he was again interviewed by Reid until about 8 o'clock. At about 10:10 p.m. a court reporter came to the headquarters after which in response to questions asked by Reid, Parker admitted that he had killed Nancy Parker, his wife. The questions and answers were taken down in shorthand and transcribed by the reporter. The time of taking the questions and answers extended from about 10:10 p.m. to 10:57 p.m. The transcription was concluded about 12:30 a.m., December 22, 1955.

At about 11 p.m., December 21, 1955, the defendant confessed to the killing of his wife to Eugene Masters, a police officer of the city of Lincoln, and at 11:45 p.m. on that date he also confessed to Joseph T. Carroll, chief of police of the city of Lincoln. Neither of these was taken down in writing.

After the confession which was taken by the reporter was transcribed, the defendant, the reporter, Reid, and several others sat around a table and the transcription was read aloud by Reid. The defendant and others had been supplied with copies. After the reading and after corrections had been made by the defendant he signed it. He signed on each page of several copies.

All three of the confessions were admitted in evidence over objections of the defendant. The objection of importance made as to the written confession was that no proper and sufficient foundation had been laid for its admission in evidence. There were two substantial objections as to the other two. The first was that no proper and sufficient foundation, independent of the foundation for the written confession, had been made. The second was that the admissibility of these two was dependent upon the foundation for the written confession for which no proper and sufficient foundation had been laid, hence on that ground these were inadmissible.

The foundation which the defendant contends was absent was a sufficient showing that the confessions were within the meaning of the law voluntarily made.

A general statement of the rule as to admissibility of confessions, and one from which no departure has been found in the decisions of this court, is the following: "In a criminal trial a confession of guilt alleged to have been made by the defendant is not competent in evidence, unless first shown to have been voluntarily made." Jones v. State, 97 Neb. 151, 149 N. W. 327. See, also, Tramp v. State, 104 Neb. 222, 176 N. W. 543; Bush v. State, 112 Neb. 384, 199 N. W. 792; Stagemeyer v. State, 133 Neb. 9, 273 N. W. 824; Schlegel v. State, 143 Neb. 497, 10 N. W. 2d 264; Cramer v. State, 145 Neb. 88, 15 N. W. 2d 323; Kitts v. State, 151 Neb. 679, 39 N. W. 2d 283; Gallegos v. State, 152 Neb. 831, 43 N. W. 2d 1, affirmed 342 U. S. 55, 72 S. Ct. 141, 96 L. Ed. 86.

This rule is one of dual significance. Under one

application the court is called upon to determine on evidence, taken out of the presence of the jury if there is objection to taking it in the presence of the jury, whether or not it has been sufficiently shown that the confession was voluntarily made.

Under the other application if the court has found that a sufficient foundation has been laid then the jury under proper instructions is required to determine for itself whether or not on all the evidence, including the foundational evidence which the court considered, the confession was voluntarily made. Unless the jury finds beyond a reasonable doubt that it was voluntarily made its competency as evidence must be rejected.

As a basis for the first application the State is required to adduce evidence to show that the confession was voluntarily made. Its witnesses may be cross-examined, and in addition the defendant may adduce countervailing evidence. Stagemeyer v. State, *supra;* Schlegel v. State, *supra;* Kitts v. State, *supra.* This procedure was followed in the case at bar as to the written confession. As to the other two the foundational evidence was not adduced out of the presence of the jury. Objection was made but in effect withdrawn.

Under this application of the rule the court is not required, in order to allow a confession to be admitted in evidence, to consider the evidence and on the basis of weight determine the question of whether or not the confession was voluntarily made. The question is that of whether or not the affirmative evidence shows that the confession was voluntarily made and that this evidence excludes any other hypothesis. The rule is stated in Holthus v. State, 138 Neb. 200, 292 N. W. 603, as follows: "In laying a foundation in a criminal case for the admission of a confession in evidence, it is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis

of improper inducements or threats." See, also, Kitts v. State, *supra;* Gallegos v. State, *supra.*

The affirmative evidence relating to what occurred is too voluminous to repeat or even to summarize herein. It does however establish that all of the commitments of the defendant with regard to the death of Nancy Parker were in his words; that no threats or promises were made to induce the statements made; that he was under no duress or compulsion at the time; that he was not under arrest; that at the time the transcription of the confession was read to and by him he was asked to examine for errors and to make corrections if he found any; and that he found a number of errors to which he called attention which he corrected in his own handwriting. It does establish that the defendant was questioned with intensity over two very considerable periods of time but this fails to support a hypothesis that his commitments in the confession were not freely and voluntarily made.

It is true that foundational or negative evidence adduced on behalf of the defendant was in conflict with the affirmative evidence, but for the purpose of determining foundation for admissibility under the rule in this jurisdiction only the affirmative evidence requires consideration.

In view of this it must be said that the court did not err in admitting in evidence the written confession. On the same substantial basis it must be said that no error was involved in the reception of the other two confessions.

This rule did not deprive the defendant of any right to have his guilt or innocence determined upon all of the facts and circumstances surrounding the act for which the defendant was being tried, including all of those incident to the confessions.

After the court determined on evidence taken out of the presence of the jury that foundation had been laid for admission of the confession in evidence, but before

submission of it to the jury, it became the duty of the county attorney to submit all of the evidence of foundation to the jury before the confession could properly be submitted.

This was done and in his turn the defendant submitted all of his countervailing evidence. In this manner the jury was permitted to weigh the evidence of the State and of the defendant on the question of whether or not the confessions were voluntary and by its verdict to make its finding thereon. This was in accord with legal principles which obtain in this jurisdiction.

In Kitts v. State, *supra,* it was said: "The question of whether or not in the first instance the State has laid a proper and sufficient foundation for the admission of such evidence is one of law for the court, and if the court determines as a matter of law that no sufficient foundation has been laid then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still a question of fact to be determined by the jury." See, also, Cramer v. State, *supra;* Gallegos v. State, *supra.*

The question of whether or not the jury, in the event of the admissibility and admission into evidence of the confessions, was justified in finding that they were voluntarily made does not require consideration in this opinion. The sufficiency of the evidence to sustain a finding by the jury that foundation had been laid is not challenged by any assignment of error. Also the brief of the defendant contains no assignment of error which challenges the sufficiency of the evidence to sustain the verdict.

By the fourth assignment of error the defendant calls attention to the fact that in instruction No. 15 the court employed the term "persons in authority" without explanation, and that this was prejudicial error.

The term was employed at three different places in the instruction, which instruction directs the jury as to the manner in which it should approach, consider, and de-

termine whether or not a proper foundation had been laid for the admission of the confessions in evidence. In each instance it was cautionary coupled with other cautionary direction. Substantially the particular caution of the first two was that the jury could not find that the confessions were voluntarily made unless they found that they were not procured or induced by promises made by "persons in authority." The third pointed out that the fact that questions were propounded by persons in authority would not of necessity render the confessions inadmissible.

The theory appears to be that by the use of these words the jury was told that the element of procurement or inducement by promises was limited to persons in authority. We cannot so regard it in the light of all of the cautionary provisions of the instruction. It can only be said reasonably that these words are calculated to make specifically applicable to "persons in authority" that which has been made applicable to persons in general by the cautionary instruction.

By the fifth assignment of error it is contended that the court failed to instruct the jury that the burden was on the State to establish that the written confession was voluntarily made. The contention is without merit. In truth by instruction No. 15 the jury was clearly and unequivocally so instructed.

By the sixth assignment of error it is contended that the court failed to instruct the jury on the theories of the defense. In the briefs it is not pointed out with any degree of particularity wherein the court so failed. No instructions in this area or in any other area were requested. Careful examination fails to disclose any such failure. The conclusion reached is that there was no such failure.

By the seventh assignment of error the contention is made that the jury should have been instructed that if it was found that the written confession was involuntary that the oral confessions should be rejected

and disregarded. No case has been cited to sustain this abstract contention.

As it has been pointed out in Leyra v. Denno, 347 U. S. 556, 74 S. Ct. 716, 98 L. Ed. 948, where successive confessions have been made in truth and in fact on a single foundational basis and one has been rejected on the ground that it was not voluntarily made, the others should be rejected on the same basis. No case has been cited and none has been found the effect of which is to say that where, as in this case, the confessions rest upon different foundations that a jury should be told that if it found that the foundation for one failed the others should be rejected.

In this case by instruction No. 15 the confessions and their foundations were in essence submitted properly for separate consideration.

A fellow worker of Nancy Parker was called as a witness for the prosecution who was permitted over objection to describe Nancy Parker's apparent general attitude for a period before and particularly on the day before her death. This did not include conversations relating either to herself or to the defendant. The defendant by the eighth assignment of error urges that this was prejudicial error.

We think this evidence should not have been admitted since it was in no way related to or attempted to be related to any attitude of her to the defendant or of the defendant to her, or to what occurred on December 14, 1955. In 26 Am. Jur., Homicide, § 361, p. 405, it is said: "Generally speaking, however, it is only under exceptional circumstances that evidence of the conduct, acts, and utterances of the deceased becomes relevant and admissible. Ordinarily, what he may have done or said previous to the homicidal act and unconnected therewith is too remote to be considered." While this evidence was inadmissible under this general rule we are unable to see how it could have prejudiced the defendant.

Frank H. Tanner, a physician, went to the residence of

the defendant on December 14, 1955, after Nancy Parker was found. He made what appears to have been a superficial examination which included an examination of the legs. Later at the hospital he made a further examination. He was called as a witness and after testifying as to the examination made at the residence and giving information that he had further examined her at the hospital he was asked to and did give his opinion as to the length of time she had been dead at 1:30 p.m. on December 14, 1955. The defendant called a doctor, who, on the basis of a hypothetical question which included an assumption of facts testified to by Dr. Tanner, gave his opinion as to the time prior to 1:30 p.m. Nancy Parker died. The assumption however did not include a reference to the testimony of Dr. Tanner that he had made a further examination at the hospital as a basis for his opinion. This opinion differed from the opinion of Dr. Tanner. Dr. Tanner was called in rebuttal and at that time he substantially testified more fully as to the later examination and that his opinion as to the time of death related to both rather than to the earlier examination alone.

The defendant by the ninth assignment of error urges that this was evidence-in-chief and that it was error to allow it to be adduced in rebuttal. He insists substantially that it was prejudicial because the witness for the defendant was not allowed to consider it in arriving at his opinion, which prejudice could not be overcome since the witness for the defendant was no longer available.

The testimony was merely elucidative of evidence already given by the witness in the case-in-chief the purport of which had not been properly reflected by the hypothesis presented by the defendant to his witness. In the strict sense this was not rebuttal but since it cannot be observed that it was prejudicial to the defendant the court did not abuse its discretion in admitting it.

In Drewes v. State, 156 Neb. 319, 56 N. W. 2d 113, it was said: "It is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting." See, also, Hampton v. State, 148 Neb. 574, 28 N. W. 2d 322.

The next assignment of error to be considered is the twelfth. By the assignment it is urged that the county attorney was guilty of misconduct in the cross-examination of Dr. R. B. H. Gradwohl, a witness for defendant. From the argument it appears that the complaint is that questions were asked which were not gone into and were foreign to the matters inquired about on direct examination. It is not urged that the court erred in rulings but only that the county attorney was guilty of misconduct in his inquiries.

There is nothing whatever in the questions to which reference is made in the briefs which could on their face or otherwise be regarded as prejudicial even if the cross-examination was not proper. The witness was from St. Louis, Missouri, and testified as an expert. Certain articles were taken to him by a Mr. Harris for examination before he was called to testify. On cross-examination the witness was asked: "Q Did he (Mr. Harris) bring something down there for you to examine? A Yes. Q What was that? A He brought down some exhibits, I suppose you would call them. Q What were they? A He brought down blood of the defendant." At that point there was an interruption as follows: "MR. COOK: Just a moment, your Honor." This was followed by the following question by the county attorney: "Q What else?" At that point objection was made that this was not cross-examination. The objection was sustained. One more question was asked as follows: "Q Did he bring down a quilt?" Objection to this was made and sustained.

By the thirteenth assignment of error the defendant urges that Dr. Gradwohl was prejudicially restricted in his direct examination. After having a hypothetical

question propounded to him Dr. Gradwohl was asked if he had an opinion as to the time of death of Nancy Parker. He replied in the affirmative. He was then asked: "Q Will you explain it?" He started an answer which on motion was stricken on the ground that the answer was not responsive. Whether or not the ruling was proper at the time is unimportant, for the reason that immediately following this the witness was allowed to express his opinion and to explain his reasons therefor in great detail. The assignment is without merit.

By the fourteenth assignment of error the defendant contends that the court erred in denying his right to examine contents of the stomach of Nancy Parker after an examination of a portion of such contents had been made on behalf of the State. This leave was denied on February 14, 1956.

The rule which we think should be applied in a situation such as is presented here is the one generally applicable in the case of request for examination of documentary evidence as follows: "In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the state to produce written confessions, statements and other documentary evidence for the inspection of defendant's counsel before the trial. Error may be predicated only for an abuse of such discretion." Cramer v. State, *supra.*

Whether or not however the court in the first instance abused its discretion in denying the motion does not become important since a submission of contents of the stomach was afforded during the course of the trial and evidence was given in regard thereto. There is nothing in the record to indicate that the results obtained were any different from what would or could have been obtained from an earlier examination. In this light if there was error it was without prejudice.

By the eleventh assignment of error the defendant urges that the court erred in refusing to admit in evidence on behalf of the defense the result of polygraph

tests of the defendant made by one Dr. Douglas M. Kelley.

Dr. Kelley was called as a witness by the defendant and during the examination the court was informed that questions would be propounded the purpose of which would be to lay a foundation for conclusions to be drawn from a polygraph examination. The county attorney objected to such questioning on the substantial ground, among others, that under the decisions of this court the results of polygraph tests were not admissible in evidence. The objection was based upon the following from Boeche v. State, 151 Neb. 368, 37 N. W. 2d 593: "The polygraph, commonly known as a lie detector, used for determining the truthfulness of testimony has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory."

The question was not immediately ruled upon. The witness was examined at great length and in great detail in the area relating to foundation for admissibility of testimony of one who had made tests with a polygraph. At the conclusion of this evidence as to foundation the objection of the county attorney was sustained.

Of course if we are not to depart from what was said in Boeche v. State, *supra*, and we think we should not do so, the objection was properly sustained.

If however the disposition should be to depart from the former pronouncement, it could not well be said in any event that the ruling was, on the record, prejudicial. After the ruling was made the witness was asked no question the purport of which was to elicit from him any information as to test or tests made, results obtained or observed, or opinion or conclusion of the witness flowing therefrom. Also there was no offer to prove anything in these areas. The rule applicable is the following: "When on direct examination an objection to a question is interposed by the adverse party and sustained, there must be an offer of proof of the facts

sought to be put in evidence by the question in order to present the ruling to this court for review." Huckfeldt v. Union Pacific R. R. Co., 154 Neb. 873, 50 N. W. 2d 110. See, also, Dean v. State, 128 Neb. 466, 259 N. W. 175; Employers Mutual Casualty Co. v. Brazda, 152 Neb. 633, 42 N. W. 2d 195.

The fifteenth, sixteenth, and seventeenth assignments of error deal with three phases of alleged misconduct. One has reference to misconduct of spectators, one to Audrey Wheeler, a State's witness, and the third to the county attorney. Only the one relating to the county attorney requires any consideration beyond calling attention to the fact that nothing relating to the other two is sustained by anything affirmatively appearing on the record. This court said in Shaffer v. State, 123 Neb. 121, 242 N. W. 364: "To make error in a trial available for a reversal in the appellate court it should be called to the attention of the district court and be affirmatively shown on the record for review." See, also, Buck v. Zimmerman, 144 Neb. 719, 14 N. W. 2d 335; State ex rel. League of Municipalities v. Loup River Public Power Dist., 158 Neb. 160, 62 N. W. 2d 682.

As to the county attorney only one phase of misconduct requires attention here. In his opening argument to the jury the county attorney made a remark to the jury, the tenor of which does not require repetition here, which on its face could have been regarded as prejudicial. In the light of subsequent events disclosed by the record it appears that it flowed from a misunderstanding of the record. Exception was taken to the remark and the county attorney frankly admitted his error. Exception was taken to the remark but it is to be noted that a mistrial was not requested. The request in relation thereto was the following: "* * * and the defendant requests the Court at this time to admonish the jury that such fact did not appear as a matter of record and should be disregarded." The court admonished the jury as follows: "* * * you are admonished

to disregard the statement made by the County Attorney and which was objected to by Mr. Cook. Disregard it completely." All of this appears in the bill of exceptions.

Under the pronouncement made by this court in Argabright v. State, 62 Neb. 402, 87 N. W. 146, as follows, it must be said that this assignment does not present grounds for reversal: "Where counsel for the state refered in argument to the jury to facts not in evidence, and upon objection that the statements were unwarranted by the evidence the district court instructed the jury to disregard such statements, there was left no ground for complaint, for the reason that the court, when appealed to, granted all relief prayed for." See, also, Hoover v. State, 48 Neb. 184, 66 N. W. 1117; Hukill v. State, 109 Neb. 279, 190 N. W. 867; Cooper v. State, 120 Neb. 598, 234 N. W. 406.

The assignment of error remaining for consideration is the tenth. By this assignment the defendant urges that the court erred in sustaining the State's motion to dismiss the amendment to defendant's motion for new trial. The amendment was filed June 1, 1956, which was on the 29th day after the verdict.

Section 29-2103, R. R. S. 1943, provides that a motion for new trial shall be filed within 10 days after a verdict is rendered. There are exceptions to the rule but none of them have any application in this case. The statute by its terms is mandatory. Prior to 1947 the period was 3 days. In 1947 the period was extended to 10 days. Before the amendment this court held the statute fixing the time for filing a motion for new trial was mandatory and that the court was without jurisdiction to permit an amendment to a motion after the expiration of the time fixed by the statute. McCoy v. State, 110 Neb. 360, 193 N. W. 716. See, also, Carlsen v. State, 129 Neb. 84, 261 N. W. 339. No reason is apparent why an attitude different from the one applied to the 3-day limitation should attach to the later and more extended limitation. This conforms to the expression of

this court with regard to a like limitation contained in section 25-1143, R. R. S. 1943, on the right to file motion for new trial in civil cases. In Klause v. Nebraska State Board of Agriculture, 150 Neb. 466, 35 N. W. 2d 104, it was said: "A motion for new trial not filed in conformity with section 25-1143, R. S. Supp., 1947 (section 25-1143, R. R. S. 1943), as to time may not be considered by this court on review." The holding therefore is that the limitation of 10 days is mandatory. In this light the assignment of error must be said to be without merit.

From a full consideration of the record in this case no reversible error has been found. The judgment of the district court is therefore affirmed.

AFFIRMED.

NORTON URWILLER, APPELLANT, V. PLATTE VALLEY STATE BANK, A CORPORATION, APPELLEE.
83 N. W. 2d 88

Filed May 17, 1957. No. 34151.

Bills and Notes. Retention for more than 24 hours by a bank of a check forwarded to it for collection and payment does not render the bank liable as an acceptor under section 62-1,137, R. R. S. 1943.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Moller R. Johnson, for appellant.

Richard A. Dier, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for Buffalo County of an action brought therein by Norton Urwiller against the Platte Valley State Bank of Kearney, Ne-

braska, to recover the sum of $2,491.11. The right to recover is claimed under and by virtue of the provisions of section 62-1,137, R. R. S. 1943, of the Uniform Negotiable Instruments Law. The action is based on a check issued by Ira McCord on December 8, 1953, to plaintiff on McCord's account in the defendant bank. The parties waived their right to a jury trial and submitted the matter to the trial court. After hearing the evidence the trial court rendered a judgment dismissing plaintiff's petition. Plaintiff thereupon filed a motion for new trial and this appeal is from the order overruling it.

Appellant maintains a place of business at Ravenna, Nebraska, where he engages in buying and selling livestock, his principal business being the direct buying of hogs. Ira McCord of Kearney, Nebraska, a licensed hog buyer, was a regular customer of his and on Tuesday, December 8, 1953, purchased of appellant 50 head of hogs and a small amount of bedding and feed, shipping the hogs to San Francisco, California, that evening. In payment of his purchase McCord issued to appellant his check on appellee in the sum of $2,491.11. On the following day, Wednesday, December 9, 1953, appellant's wife deposited this check to appellant's account in The Ravenna Bank, of which bank appellant was a regular customer. Appellant's wife deposited it, with other checks, in the regular course of business and gave the Ravenna bank no special instructions in regard thereto. Consequently the bank forwarded the check for collection in the usual course of business through regular channels, doing so by sending it in the mail to its correspondent bank in Lincoln, Nebraska. The bank in Lincoln sent it by mail to the Omaha branch of the Federal Reserve Bank which, in turn, sent it by mail to appellee for payment.

The check was received by appellee in a cash letter from the Omaha branch of the Federal Reserve Bank during business hours on Saturday, December 12, 1953, Saturday being a regular business day. The cash letter

contained no special instructions as to this check. The check was proofed on the day it was received and posted for action on the following business day, which was Monday, December 14, 1953. On Monday it was decided not to pay the check, but mark it for "return," because the drawer thereof did not have sufficient funds on deposit in his account with appellee with which payment could be made, and this was true at all times between December 12 and 18, 1953, both days included. Although marked for return on Monday, December 14, 1953, the actual return thereof was not made to the Federal Reserve Bank until Wednesday, December 16, 1953. This delay in return was caused by the fact that bank examiners came and assumed control of all the records of the bank, including cash items, on Monday morning, December 14, 1953, and did not return such records to those in charge of the bank until they had been checked and proved. Appellant was advised by the Ravenna bank late Thursday afternoon, December 17, 1953, of the fact that payment of the check had been refused although the check was not actually returned to him until Saturday, December 19, 1953. The check has never been paid. Neither has a judgment for the amount thereof been paid which appellant has obtained against McCord.

The record does not show the delay in the return of the check to the Federal Reserve Bank from Monday to Wednesday was due to any fault on the part of appellee, nor is there any evidence that appellant was damaged in any way because thereof. However, appellant contends that under the provisions of the statute hereinbefore cited that retention of a check by a drawee bank for more than 24 hours after it is presented to it for payment constitutes an acceptance of the instrument so that the drawee bank is bound to pay it; that is, under the statute a failure of the drawee bank to either remit the proceeds of or return a check to the holder within 24

hours after it has been received for payment constitutes acceptance.

Chapter 62, article 1, R. R. S. 1943, contains all the legislative enactments relating to the Uniform Negotiable Instruments Law. Thereunder a check is classified as a bill of exchange drawn on a bank payable on demand and, except as therein otherwise provided, the provisions thereof applicable to bills of exchange payable on demand apply to checks. § 62-1,185, R. R. S. 1943. However, a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank and the bank is not liable to the holder unless and until it accepts or certifies the check. § 62-1,189, R. R. S. 1943. The same is true of a bill of exchange as it relates to funds in the hands of the drawee available for the payment thereof. § 62-1,127, R. R. S. 1943. By accepting the instrument the acceptor agrees that he will pay it according to the tenor of his acceptance. § 62-162, R. R. S. 1943. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour on a business day to the drawee or some person authorized to accept or refuse acceptance on his or its behalf. § 62-1,145, R. R. S. 1943.

Division (j) of Chapter 62, article 1, R. R. S. 1943, which includes sections 62-1,132 to 62-1,142, both inclusive, deals with "Acceptance." Section 62-1,132, R. R. S. 1943, thereof provides the acceptance must be in writing and signed by the drawee. Section 62-1,136, R. R. S. 1943, provides the drawee is allowed 24 hours after presentment in which to decide whether or not he will accept the bill. Section 62-1,137, R. R. S. 1943, on which appellant relies, provides: "Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder he will be deemed to have accepted the same." It will be noted this section applies when "a bill is de-

livered for acceptance" - not payment, the latter being the situation here for at no time was the check ever presented to appellee for acceptance.

Presentment for payment and presentment for acceptance are two different acts well known to the law of negotiable instruments. See, First Nat. Bank of Omaha v. Whitmore, 177 F. 397; First Nat. Bank of Goree v. Tally, 115 Tex. 591, 285 S. W. 612; Hunt v. Security State Bank, 91 Or. 362, 179 P. 248; First Nat. Bank of Quitman v. Wood County (Tex. Civ. App.), 294 S. W. 324; First Nat. Bank of Washington v. Whitman, 94 U. S. 343, 24 L. Ed. 229; First Nat. Bank v. Brule Nat. Bank, 38 S. D. 396, 161 N. W. 616, 12 A. L. R. 1079; Hibbard v. Parciak, 94 Conn. 562, 109 A. 725; Blacker & Shepard Co. v. Granite Trust Co., 284 Mass. 9, 187 N. E. 53; State Bank of Chicago v. Mid-City Trust & Savings Bank, 295 Ill. 599, 129 N. E. 498, 12 A. L. R. 989. As stated in First Nat. Bank of Goree v. Tally, *supra*: "Presentment for payment and presentment for acceptance are two different acts well known to the law of negotiable instruments, and the distinction is made clear by the terms of the Negotiable Instruments Act. The difference between the object and effect of presentation for these respective purposes is very marked. The phrases themselves suggest the material distinction. 'Payment' and 'acceptance' when applied to commercial paper mean very different things. Payment extinguishes the debt and puts an end to the paper evidencing the same, while acceptance has the very opposite effect. It creates a new liability upon the part of the acceptor, and gives new life to the instrument."

We do not think the section relied on has any application to the factual situation here presented where the check was presented to appellee for payment and not for acceptance. As stated in First Nat. Bank of Winnsboro v. First Nat. Bank of Quitman (Tex. Comm. App.), 299 S. W. 856: "* * * 'retention for more than 24 hours by a bank of a check forwarded to it for collection and

payment' does not render the bank liable as an 'acceptor' under that law, for the reason that the sections relied upon for that purpose have no application to such a transaction." See, also, Mitchell Livestock Auction Co. v. Bryant State Bank, 65 S. D. 488, 275 N. W. 262.

We recognize that courts are divided on this question. See, Mt. Vernon Nat. Bank v. Canby State Bank, 129 Or. 36, 276 P. 262; American Nat. Bank v. National Bank of Claremore, 119 Okl. 149, 249 P. 424; First State Bank of Talihina v. Black Bros. Co., 187 Okl. 124, 101 P. 2d 802; First Nat. Bank of Winnfield v. Citizens' Bank of Campti, 163 La. 919, 113 So. 147. As stated in First State Bank of Talihina v. Black Bros. Co., *supra*: "The defendant, however, takes the position that when, as in this case, a check is presented to a drawee bank, the action contemplated on the part of the bank is that of payment, and that the term 'acceptance' is contra-distinguishable and not applicable to the transaction involved, and that therefore section 11436, supra, has no application to the case at bar. The argument is not without supporting authority. * * * Indeed from the annotation on the subject appearing in 63 A. L. R. at page 1140, it would appear that the division of authority upon the point is about even."

The opposite view is fully discussed in Wisner v. First Nat. Bank of Gallitzin, 220 Pa. 21, 68 A. 955, 17 L. R. A. N. S. 1266. However, we are not willing to construe a statute so as to impose a penalty upon the banks of this state, such as we are here asked to do, unless the Legislature uses language clearly so providing. In the absence of a statutory right appellant is left to his common law right for either a breach of contract or for a tortious breach of a duty. Henefin v. Live Stock Nat. Bank, 116 Neb. 331, 217 N. W. 91, 58 A. L. R. 758; Omaha Nat. Bank v. Kiper, 60 Neb. 33, 82 N. W. 102.

As stated in 7 Am. Jur., Banks, § 660, p. 479: "A collecting bank is, however, as a general rule, under no absolute obligation to collect the paper intrusted to it,

but is required to use only reasonable care and diligence in making the collection; if it does so, it incurs no liability to its customer for a loss resulting from a failure to make the collection."

And in 7 Am. Jur., Banks, § 694, p. 501, it is said: "According to the overwhelming weight of authority, the measure of damages for breach of duty by a bank in respect of the collection of the commercial paper intrusted to it is the actual loss suffered by the owner of the paper in consequence of the negligent misconduct or default of the bank, * * *."

Since appellant did not bring himself factually within either of the latter, we find the trial court was correct in dismissing his petition. We therefore affirm its action doing so.

AFFIRMED.

W. JACK SMITH, APPELLEE, V. HAROLD ELY ET AL., APPELLEES, IMPLEADED WITH HELEN M. SCHROEDER, APPELLANT.
83 N. W. 2d 55

Filed May 17, 1957. No. 34162.

1. **Fraudulent Conveyances.** A conveyance is declared to be fraudulent when its object or effect is to defraud another, or the intent with which it is made is to avoid some duty or debt due by or incumbent upon the party making the transfer.
2. ———. The intent may be gathered from the acts of the parties, and a conveyance becomes fraudulent in law when it is shown that it was made for the purpose of placing the property beyond the reach of creditors, or that it would hinder or delay them in collecting their just demands.

APPEAL from the district court for Hall County: ERNEST G. KROGER, JUDGE. *Affirmed.*

A. G. Abbott, for appellant.

Wellensiek & Weaver, E. Merle McDermott, and *James I. Shamberg,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for Hall County. It involves the foreclosure of mortgages on an unimproved 14-acre tract of land located in Hall County. The trial court, on September 28, 1956, rendered a decree of foreclosure therein wherein it awarded to Helen M. Schroeder, a defendant and cross-petitioner, a first lien on these premises in the sum of $5,252.39 with interest thereon at 6 percent from date thereof; to W. Jack Smith, plaintiff, a second lien thereon in the sum of $3,428.60 with interest thereon at 9 percent from date thereof; and to Helen M. Schroeder a third lien in the sum of $19,558 with interest thereon at 6 percent from December 4, 1954. Helen M. Schroeder filed a motion for new trial and, from the overruling thereof, has perfected this appeal.

Appellant contends the mortgage on which appellee W. Jack Smith depends as a basis for his second lien was given to him by Harold and Faye Ely for the purpose of hindering, delaying, and defrauding her as a creditor of the Elys by preventing her from collecting the debts which the Elys then owed her, which are now in the form of a judgment, out of any equity the Elys might have in this 14-acre tract above her first mortgage. In view thereof it is her contention that Smith's lien should be placed third and her judgment lien of $19,558 second. This being an equitable action we shall consider the record accordingly.

We said in Butke v. Nachschoen, 133 Neb. 366, 275 N. W. 318, quoting from 27 C. J., Fraudulent Conveyances, § 11, p. 415, that: "'A conveyance is declared to be fraudulent when its object or effect is to defraud another, or the intent with which it is made is to avoid some duty or debt due by or incumbent upon the party making the transfer.'" See, also, Farmers State Bank

of Ewing v. Dierks, 137 Neb. 442, 289 N. W. 860; Van Steenberg v. Nelson, 147 Neb. 88, 22 N. W. 2d 414.

And in Brown v. Sloan, 61 Neb. 237, 85 N. W. 37, we said: "Where a vendor sells and transfers his property with the intent and purpose of hindering, delaying, or defrauding his creditors, and the vendee purchases such property with knowledge of the fraudulent intent of the vendor, or knowledge of such facts and circumstances as would put a prudent man on inquiry, which, if pursued, would lead to a knowledge or notice of the fraudulent purpose of the vendor, such sale and transfer is fraudulent and void as to the creditors of such vendor."

Harold and Faye Ely, husband and wife, whom we shall hereinafter refer to as the Elys, came to Hall County, Nebraska, in 1942. In December 1944 they purchased an improved 18-acre tract south of Grand Island in Hall County. It was located on South Locust Street at the intersection of U. S. Highways Nos. 34 and 281. The Elys immediately moved onto this property and made it their home. See Schroeder v. Ely, 161 Neb. 262, 73 N. W. 2d 172. In July 1947 appellant agreed to loan the Elys sufficient money to construct and equip a motel on this 18-acre tract on condition that she could have a home with the Elys, as one of the family, for the balance of her life, the Elys agreeing to repay the money but not interest thereon. The construction of the motel was completed in 1949. See Schroeder v. Ely, 161 Neb. 252, 73 N. W. 2d 165.

In July 1950 the Elys bought an unimproved 14-acre tract in the immediate vicinity of the 18-acre tract on which to erect a sign for the motel they had built and to keep out competitors as the site purchased was a desirable location for a motel. The Elys paid $7,000 for this tract, all of which was furnished by appellant. To secure this advance the Elys gave appellant a first mortgage thereon for the full amount, payable $50 per month beginning August 15, 1950.

In July 1953 appellant was no longer able to stay with

the Elys because of Faye Ely's conduct. See Schroeder v. Ely, 161 Neb. 252, 73 N. W. 2d 165. She thereupon, on September 10, 1953, brought a suit to recover the money she had advanced to the Elys to construct and equip the motel on the 18-acre tract, being case No. 12464 in the district court for Hall County. At the same time she brought an action to foreclose the $7,000 mortgage on the 14-acre tract and to reform the mortgage given to secure it as it only described a tract of 11.9 acres, being case No. 12463 in the district court for Hall County. A lis pendens for each case was recorded in the office of the register of deeds of Hall County, the notice in each case relating only to the tract therein involved. A settlement of their difficulties was thereafter made by Harold Ely and appellant on September 17, 1953. This settlement was subsequently set aside. See Schroeder v. Ely, 161 Neb. 252, 73 N. W. 2d 165.

On October 10, 1953, Harold Ely, pursuant to an agreement he had with her, paid appellant, through her attorney, the sum of $3,010.28 on the $7,000 first mortgage on the 14-acre tract, being $1,900 of delinquent monthly payments of $50 each and $1,110.28 of interest then due. This left an unpaid balance of $5,100. Appellant, pursuant to the agreement, took a new note for this amount, payable $50 a month commencing October 15, 1953, and a first mortgage on the 14-acre tract as security therefor. She then had the court dismiss the foreclosure action and caused both the $7,000 mortgage and lis pendens to be released. The $5,100 first mortgage is the indebtedness owing her by the Elys for which she has been given a first lien herein.

In order to pay appellant these past-due amounts on the first mortgage of $7,000 the Elys borrowed from their friend appellee W. Jack Smith, whom we shall hereinafter refer to as Smith, the sum of $2,800, using that amount and $210.28 of their own funds to make the payment to appellant already referred to. When Smith made the loan he knew what the money was to be

used for by the Elys and the Elys had agreed to give him a second mortgage on this 14-acre tract as security therefor, subject only to the unpaid balance of appellant's mortgage in the sum of $5,100. The Elys gave Smith their promissory note in the sum of $2,800, dated October 10, 1953, and due 1 year after date with interest at 5 percent until due and 9 percent thereafter, to evidence their indebtedness to him and, as security therefor, the second mortgage already referred to. This is the indebtedness of the Elys for which Smith was given a second lien in this action.

In case No. 12464, which was the action brought by appellant to recover the funds she had advanced to the Elys to build the motel, appellant recovered a judgment on June 25, 1954, in the sum of $56,055 and was given a lien therefor on the motel property, together with all furnishings and fixtures therein and equipment and chattels used in connection therewith. After the foregoing property had been sold in order to satisfy her judgment there was still owing appellant thereon a balance of $19,558 and interest for which amount she has been given a third lien.

We have carefully examined the evidence as it relates to the loan from Smith to the Elys. It conclusively establishes that Smith actually loaned the Elys $2,800 of his own funds so that the Elys could pay appellant the past-due principal and interest on her first loan on the 14 acres herein involved and that the Elys actually used the money loaned them by the Smiths for that purpose. It is significant that Smith took a second mortgage for the amount of his loan and not a deed to the property since he testified the 14-acre tract was very valuable as a potential motel site and worth as much or more than both mortgage liens then against it. We conclude the transaction was bona fide. As a result thereof appellant received not only the full amount of the loan but, in addition, the sum of $210.28, being money furnished by the Elys. The question of fraudulent in-

tent is a question of fact. See, Hilton v. Clements, 137 Neb. 791, 291 N. W. 483; Farmers State Bank of Ewing v. Dierks, *supra;* Becker v. Linton, 80 Neb. 655, 114 N. W. 928, 127 Am. S. R. 795. As stated in Becker v. Linton, *supra:* "The intent may be gathered from the acts of the parties, and a conveyance becomes fraudulent in law when it is shown that it was made for the purpose of placing the property beyond the reach of creditors, or that it would hinder or delay them in collecting their just demands." Under the factual situation hereinbefore set out it is difficult to see just how appellant can claim the loan was made with the intent and purpose of hindering and delaying her in the collection of what the Elys were owing her at that time or just how it could have the effect of defrauding her. Certainly she was in as good or better position as a creditor of the Elys after she had been paid all the proceeds of the loan as she was before.

Appellant contends the record is so full of suspicious circumstances, often referred to as badges of fraud, that they raise a presumption of fraud sufficient to entitle her to recover. Among them are the fact that the Elys were in financial difficulties, as is evidenced by the two suits which appellant had instituted and were then pending against them, and the fact that Smith made this loan as a friend at a time when he had substantial debts against properties he then owned and was operating. He paid off the latter in 1955 when he sold the properties, which were motels. But inferences or presumptions arising from such suspicious circumstances are subject to being contradicted and may be overcome by evidence which establishes the bona fides of the transaction. That is the situation here.

We think the evidence adduced fully supports the decree rendered by the trial court. We therefore affirm its judgment.

AFFIRMED.

DOLORES LUCILLE WORKMAN, APPELLANT, V. FRANK MUNROE WORKMAN, APPELLEE.
83 N. W. 2d 368

Filed May 24, 1957. No. 34057.

1. **Divorce.** Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes "extreme cruelty" as defined in section 42-302, R. R. S. 1943.
2. ———. A decree of divorce cannot be granted solely on the declarations, confessions, or admissions of the parties. There must be corroborative evidence of the facts necessary to be established as required by section 42-335, R. R. S. 1943.
3. ———. It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances.
4. ———. Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and a repetition of the offense revives the wrong condoned.
5. ———. In a divorce suit, where the court has jurisdiction of the parties, it has power to adjust all their respective property interests.
6. ———. The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case.
7. ———. In fixing the amount of alimony in a divorce action the court will take into consideration the estate of each party at the time of the marriage, their respective contributions since, the duration of the marriage, the wife's loss of her interest in the husband's property by virtue of the divorce, the social standing, comforts, and luxuries of life which the wife would probably have enjoyed except for the enforced separation, the conduct of the parties leading up to the divorce and to which party the divorce is granted, their age and condition of health, and all other facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Reversed and remanded with directions.*

Crosby, Pansing & Guenzel and *Perry, Perry & Nuernberger,* for appellant.

Max Kier, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action for divorce brought by Dolores Lucille Workman as plaintiff in the district court for Lancaster County against Frank Munroe Workman, defendant. The defendant filed a cross-petition praying for a divorce. The trial court dismissed the plaintiff's petition and the defendant's cross-petition, denying a divorce to both parties. The plaintiff and defendant both filed motions to vacate the judgment of the district court. Both of these motions were overruled. From the order overruling the plaintiff's motion to vacate the judgment, the plaintiff appeals.

The plaintiff's petition charged the defendant with extreme cruelty toward her. She asked for custody of the minor children, child support, alimony, and a division of the property acquired by the parties during their marriage. In addition, the plaintiff alleged the formation of corporations and the creation of certain trusts by the defendant and other business matters conducted by him with the purpose of defrauding the plaintiff of any rights she might have in the property of the parties.

The defendant filed a cross-petition in which he charged the plaintiff with extreme cruelty; admitted the formation of corporations and trusts as alleged in the plaintiff's petition; denied any fraud in connection therewith; and prayed for a divorce.

The plaintiff, by reply to the answer and answer to the defendant's cross-petition, denied the allegations of extreme cruelty contained therein and all other affirmative matter alleged by the defendant with reference to the formation of the corporations and creation of the trusts.

In an appeal to this court in a divorce action the cause is tried de novo. Messer v. Messer, 157 Neb. 312, 59 N. W. 2d 395.

We deem the following to be applicable to this appeal.

Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes "extreme cruelty" as defined in section 42-302, R. R. S. 1943. See, Smith v. Smith, 160 Neb. 120, 69 N. W. 2d 321; Egbert v. Egbert, 149 Neb. 227, 30 N. W. 2d 669.

Extreme cruelty may consist of personal injury or physical violence, or it may be acts or omissions of such character as to destroy the peace of mind or impair the bodily or mental health of the one upon whom they are inflicted or toward whom they are directed, or be such as to destroy the objects of matrimony. See Messer v. Messer, *supra*.

A decree of divorce cannot be granted solely on the declarations, confessions, or admissions of the parties. There must be corroborative evidence of the facts necessary to be established as required by section 42-335, R. R. S. 1943. See, Hines v. Hines, 157 Neb. 20, 58 N. W. 2d 505; Smith v. Smith, *supra*.

It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances. See, Schlueter v. Schlueter, 158 Neb. 233, 62 N. W. 2d 871. See, also, Hines v. Hines, *supra*.

The bill of exceptions in this case is voluminous. It would serve no useful purpose to detail the evidence of the respective witnesses.

For convenience we will refer to the parties as designated in the district court.

The record discloses that the parties were married at

Washington, Kansas, on April 20, 1937. At the time of their marriage they were each 29 years of age, and at the time of trial they were each 48 years of age. The plaintiff had been previously married. Her first husband died about February 13, 1937. The defendant had been married twice prior to this marriage to the plaintiff, and was divorced on each occasion. Five children were born to this marriage: Dellouise Workman, born December 19, 1937, and now self-supporting; Joseph Workman, born June 8, 1942; Robert Workman, born June 17, 1943; William Workman, born April 28, 1944, now deceased; and Francine Workman, born March 20, 1947.

The plaintiff came to Nebraska about 1935 or 1936, and was employed as a supervisor of a branch house of a corporation located in this city. The defendant at that time was employed by the telephone company. The defendant engaged in the business of leasing furniture and equipment in certain buildings for the purpose of renting the same to tenants. Prior to their marriage, the defendant would take the plaintiff with him on occasions to look over properties with the idea of purchasing them. After their marriage, by lease and purchase on contract, the defendant procured several properties. The plaintiff helped to plan the alterations in certain of the properties to make more rental apartments, increased the rents, and worked to make the apartments more attractive by painting and hanging wallpaper, scrubbing, varnishing the woodwork, making curtains, and doing other work necessary to induce tenants to rent. She contacted tenants, assisted in the collection of rents, and took complaints over the telephone made by tenants. She did this type of work for a period of about 12 years, or until the office was moved to a downtown location.

It appears that the parties, from the time of their marriage, lived at various locations in properties acquired for business purposes, and finally moved into a house at 940 South Cotner Boulevard to make their

permanent residence. This was sometime in January 1948. Up to 1949, according to the plaintiff's testimony, they were happily married.

The plaintiff, due to the course of conduct on the part of the defendant which she claims constituted extreme cruelty, filed an application in the district court for separate maintenance on September 5, 1953, which she subsequently dismissed. The reason for the dismissal, according to her testimony, was that she effected a reconciliation. As part of the reconciliation there was an amendment made to a revocable trust on February 12, 1954, which the plaintiff signed in June 1954. This amendment gave the plaintiff some advantages that she did not have under the trust previously. In addition, there were certain promises made by the defendant that he would remain at home nights except on occasions during the week when business matters required his absence, and that the parties would unite in their efforts to create a home for the benefit of their children and themselves.

The action of the parties in this respect amounted to condonation, which has been defined by this court as follows: Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and a repetition of the offense revives the wrong condoned. See, Kidder v. Kidder, 159 Neb. 666, 68 N. W. 2d 279; Wetenkamp v. Wetenkamp, 140 Neb. 392, 299 N. W. 491; Eicher v. Eicher, 148 Neb. 173, 26 N. W. 2d 808.

It is the plaintiff's contention that the defendant repeated the offense and revived the wrong condoned and by his subsequent conduct continued a course of cruel treatment toward the plaintiff.

The record is replete with confessions, admissions, and declarations of the parties as to their conduct involving each other. These standing alone, without corroborating evidence, would be insufficient to grant either party a divorce. Without considering the admissions,

confessions, and declarations of the parties with reference to quarrels, arguments, charges, and countercharges, there does appear in the record evidence of extreme cruelty on the part of the defendant toward the plaintiff. It would be impossible to detail these incidents. We do, however, set forth briefly some of them.

The parties for some time had been having domestic difficulties, and during September 1952, they voluntarily appeared at the office of the county attorney. One or the other of the parties had been in his office on four or six occasions. These visits were occasioned by visits had by the county attorney with law enforcement officers who had at times been called to the residence of the parties. The plaintiff complained to the county attorney with reference to the treatment she received from the defendant and the physical and mental abuse being done to her. The county attorney testified that at that time she had a discolored eye.

The older daughter of the parties testified to arguments had by them which occurred very frequently in the home, and that the defendant struck the plaintiff during the course of some of these arguments. She did not recall any instance when the plaintiff struck the defendant.

A neighbor of the parties testified that one time during the winter of 1951 or early 1952, the plaintiff came to her home one evening about 9 p.m. She had her small daughter with her. The plaintiff was upset and had a laceration behind one ear which was bleeding.

There is evidence in the record by a witness who saw the defendant and a woman in his car early one morning in June 1954, and on another occasion one evening in July 1955, and saw the same woman using the defendant's car on one occasion in September 1955. There is also testimony of another witness who saw the defendant with this woman in his car. This woman was known to both the plaintiff and the defendant.

On September 15, 1953, the plaintiff and her daughter

Dellouise went to the home of the defendant's parents for the purpose of getting the other children who were there. The defendant was also present. The plaintiff had received a telephone call having to do with the defendant's conduct. She accused the defendant of letting this particular woman out of his automobile and said she could prove it. Dellouise told the defendant that she had received the telephone call and what her mother was telling him was true. The plaintiff's father-in-law jumped to his feet, struck the plaintiff, and pushed her from the house. The defendant made no attempt to intervene or stop his father from striking the plaintiff during the course of this argument. A friend of Dellouise who had taken the plaintiff and Dellouise to the home of the defendant's parents testified that when the plaintiff came out to the car to return home she had a red mark on her cheek.

There is evidence to the effect that law enforcement officers were called by the defendant to the residence of the parties, apparently to take the plaintiff into custody on a charge that she was suffering from mental disability. However, she was not taken into custody. On September 9, 1953, the plaintiff's father-in-law filed a complaint against the plaintiff and a hearing was had on September 22, before the board of mental health. The defendant testified at that hearing from notes he had made from time to time relating to the conduct of the plaintiff toward him. This testimony was for the purpose of showing that the plaintiff needed mental treatment and perhaps confinement. The notes from which he testified were uncorroborated.

There is testimony by a matron in the office of the sheriff that on September 18, 1953, the officers were going to take the plaintiff into custody. When they arrived at the home of the parties the plaintiff had been working in the yard. She asked permission to use the telephone, which was granted. She was in a state of

shock, but, under the circumstances, was as rational as a person could be.

It appears that the complaint made against the plaintiff before the mental health board was not justified. It also appears that on the occasions when law enforcement officers were called to the home of the parties, apparently for the purpose of taking her into custody because of a mental condition, such calls were not justified. Even assuming, but not determining, that the plaintiff had required treatment for a mental condition, the conduct of the defendant toward the plaintiff with reference to such matter was inconsiderate of her feelings which caused her shock and nervousness, and amounted to cruelty on his part.

The plaintiff testified that prior to February 24, 1955, she had been receiving anonymous telephone calls of a disturbing nature with reference to the defendant being in the company of another woman. On or about February 24, 1955, the defendant called her, and two of her neighbors listened to the conversation on an extension telephone. This conversation need not be repeated, but is corroborated for the most part by the foregoing witnesses. In substance, in the conversation the defendant referred to the plaintiff as a dope addict, accused her of procuring drugs by playing up to the doctors, and accused her of running around to Crete and other places in cars and of immorality. When the plaintiff referred to the defendant spending weekends with a lady friend, he acknowledged he had, and stated that he and one of his lady friends had been to Keokuk, Iowa, plaintiff's former home, to check up on her reputation. The defendant called the plaintiff obscene and filthy names, and stated that he wished she had been killed in an automobile accident which she had.

There is evidence to the effect that the plaintiff, accompanied by a private detective and two police officers, visited the apartment of the defendant about 11:30 p.m., on an evening in April 1955, after he had separated

from her. The woman with whom the defendant had been in company on previous occasions was present.

Taking into consideration all of the evidence and considering it as this court must, de novo, the conclusion is that the plaintiff has sufficiently proved her charge of extreme cruelty against the defendant, and that the district court erred in refusing to grant her a divorce from the defendant.

This court has held: "In a divorce suit, where the court has jurisdiction of the parties, it has power to adjust all their respective property interests." Lippincott v. Lippincott, 144 Neb. 486, 13 N. W. 2d 721. See, also, Resnick v. Resnick, 137 Neb. 256, 288 N. W. 816; Bigelow v. Bigelow, 131 Neb. 201, 267 N. W. 409.

The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case. See, Francil v. Francil, 153 Neb. 243, 44 N. W. 2d 315; Lippincott v. Lippincott, *supra.*

In fixing the amount of alimony in a divorce action the court will take into consideration the estate of each party at the time of the marriage, their respective contributions since, the duration of the marriage, the wife's loss of her interest in the husband's property by virtue of the divorce, the social standing, comforts, and luxuries of life which the wife would probably have enjoyed except for the enforced separation, the conduct of the parties leading up to the divorce and to which party the divorce is granted, their age and condition of health, and all other facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties. See, Phillips v. Phillips, 135 Neb. 313, 281 N. W. 22. See, also, Swolec v. Swolec, 122 Neb. 837, 241 N. W. 771; Messer v. Messer, *supra;* Lippincott v. Lippincott, *supra.*

The plaintiff and defendant were partners in the apartment house business. This partnership continued until it was finally determined, after there had been

some accumulation of properties and equities, that the business was too large for a partnership and by forming corporations there would be a savings consummated in many respects. Four corporations were formed, namely: The Capitol Real Estate Company, Capitol Apartments, Inc., Capitol Investment Company, and Capitol Land and Investment Company. The defendant managed these corporations, made investments, took care of rentals, and generally transacted all business in connection therewith.

The record shows that both the plaintiff and defendant have great affection for their children and desired to make adequate provision for their support in the future. To do this, there was created an irrevocable trust titled the "Workman Trust." Certain assets of the corporations heretofore mentioned make up this trust, and some accumulation of assets from the business have been added to this trust. Stock certificates, as shown by the testimony, disclose the number of shares of the different corporations comprising this trust. Dividends have been paid by the trustee from the trust to the defendant, as guardian, for the benefit of the children. The assets of this trust are approximately $180,000.

There was also created, as before mentioned, a revocable trust titled the "Frank M. Workman Trust" comprising assets of certain corporations evidenced by certificates of stock. This trust provided in part that it shall continue until the youngest child of the parties becomes of age, then makes provision that in the event the youngest child predeceases the other children the next youngest becoming of age would terminate the trust.

This trust was amended, and among other things provided in substance that in the event the plaintiff is living and the defendant not living at the time the trust would otherwise terminate, the trust shall continue during the life of the plaintiff and she shall be entitled to the income of this trust for her lifetime, but upon her death the benefits of the trust shall go to the surviving children.

In the event the defendant is living at the time the trust would otherwise terminate, then the trust shall continue for and during the period of his life, but upon his death the benefits of the trust shall go to the surviving children.

This trust agreement also provided that the donors reserved the right to amend or revoke this trust agreement in whole or in part at any time, and to withdraw all or any of the principal of the trust fund at any time upon written notice to the trustee signed by both donors, except in the event the defendant predeceased the plaintiff, then in that event the surviving donor shall not have the power to further amend or revoke the trust agreement, and that the trust shall not be changed at or after the death of the defendant.

The trust agreement then provided that upon the death of the defendant in the event he survives the plaintiff, all the trust property shall be delivered to the trustee under the irrevocable trust and shall be subject to the terms and conditions of that trust.

The assets of the revocable trust appear to be approximately $300,000.

We do not in this action disturb the irrevocable trust. It is not our purpose to determine the allegations of fraud alleged by the plaintiff in her pleadings against the defendant in transferring certain properties and placing the title thereto in his parents, or his parents forming other corporations separate and distinct from those previously mentioned allegedly controlled and managed by his parents, or now, his father being deceased, by his mother who claims an ownership interest in certain of the properties.

The record shows that there is a separate action pending in the district court charging the defendant with fraud with reference to such transfers and the making of promissory notes in which his parents are payees and which are claimed not to be collectible. The parties in the action for fraud, separate and distinct from the

instant action for divorce, are not before this court. Their rights are not determinable in an action such as this, under the record here presented. The trial court did not err in so holding.

We do not here disturb the revocable trust, but to arrive at the assets of the marital estate we have taken the same into consideration in awarding alimony.

It appears that the properties here involved are, for the most part, apartment house properties. The success of the business depends upon tenants and rents collected. The income from the business fluctuates, due to its nature. The properties are mortgaged, consequently the corporations have equities therein in most instances. We believe the value placed thereon by the plaintiff is somewhat excessive and inflationary. We conclude that the fair market value of the marital estate would be between $500,000 and $600,000.

We award alimony to the plaintiff as follows: She shall have and remain in possession of the home she now occupies with her minor children located at 940 South Cotner Boulevard for the purpose of making a home for herself and the minor children until such time as the youngest child becomes of age. The defendant shall pay the rent for the same, for the reason that it is an asset of one of the corporations heretofore mentioned under the management of the defendant. The defendant shall see that the taxes and fire and tornado insurance are kept up and paid, and also that the necessary repairs and upkeep are paid on the premises. In addition, the furniture now in the household and the household appliances in the household or in or about the premises, owned by one of the corporations, shall not be removed therefrom but shall be used by the plaintiff. The plaintiff shall be awarded alimony in the amount of $120,000, payable in equal monthly installments on the first day of each month from and after the mandate issues in this case and for a period of 15 years.

All judgments or orders for the payment of alimony

are liens upon the property, as in other actions, and may be enforced by proceedings in aid of execution, or other action or process as other judgments. See, § 42-319, R. R. S. 1943; Lippincott v. Lippincott, 152 Neb. 374, 41 N. W. 2d 232. The amounts of alimony payable to the plaintiff as heretofore set out constitute a lien on the property owned by the defendant or on any property in which he may have an interest.

We find that the plaintiff is a fit and proper person to have the care, control, and custody of the three minor children now in her custody and living with her at the home place, and award the plaintiff the sum of $200 a month for support and maintenance of the minor children of the parties until the sons Joseph and Robert Workman become of age, are self-supporting, or until the further order of the court, and thereafter the sum of $100 per month for the support of Francine Workman until she becomes of age, is otherwise self-supporting, or until the further order of the court. The defendant is to have the right to be with and visit the children at reasonable and proper times.

We award as costs to the plaintiff attorney's fees in the amount of $10,000, this amount to include $4,000 which has been allowed by the trial court. The cross-appeal of the defendant with reference to allowance of attorney's fees in the district court is denied. All costs of this action shall be taxed to the defendant.

For the reasons given herein, we reverse the judgment of the trial court and remand the cause with directions to enter judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MARY FRANCES BUHRMAN, APPELLEE, V. FRANK A. SMOLLEN ET AL., APPELLANTS.
83 N. W. 2d 386

Filed May 24, 1957. Nos. 34107 and 34112.

1. **Trial.** Where, in a jury trial, a defendant, when plaintiff rests, moves for a verdict in his favor and upon the overruling of such motion proceeds with the trial and introduces evidence in support of the defenses set up in his answer, he thereby waives the right to assign error in the ruling upon such motion.
2. **Trial: Appeal and Error.** A judgment will not be reversed for error in overruling a motion for a directed verdict at the close of plaintiff's case when certain essential testimony was not then in the record, when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record, unless its admission is assigned as error here and the assignment is sustained.
3. **Automobiles.** The question of the admissibility of evidence as to the speed of a motor vehicle shortly prior to the time of an accident rests largely in the discretion of the court.
4. ———. When the speed of a motor vehicle is charged as negligence, it is proper to admit competent evidence of the speed at which it was being driven a few seconds before the collision.
5. **Trial.** In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him.
6. **Appeal and Error.** Before an error requires a reversal it must be determined that it was prejudicial to the rights of the party against whom it was made.
7. ———. Instructions not complained of in such a way as to be reviewable in this court will be taken as the law of the case, and if, when tested by such instructions the verdict is not vulnerable to the objections lodged against it, the assignments will not be sustained.
8. **Trial.** It is the duty of the trial court to present to the jury those issues which are raised by the pleadings and which find support in the evidence.
9. **Appeal and Error.** Erroneous instructions to the jury will not work a reversal of a case unless they are prejudicial to the complaining party.
10. **Negligence: Pleading.** In the absence of an issue of negligence by plaintiff or by a third person imputable to plaintiff, allegations in an answer denying that defendant was negligent and alleging that the accident and resulting damages were solely and proximately caused by the negligence of such third person

is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto, but rather is one entirely consistent with and provable under the general issue.

11. **Trial: Appeal and Error.** Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof.
12. **Trial.** It is proper for the trial judge to aid in preventing misconception by properly directed questions or remarks.
13. ———. There is no impropriety in a trial court interrogating witnesses regarding a fact under investigation when the tendency is only to develop the truth and is calculated in nowise to influence the jury save as the testimony will assist it to arrive at a correct conclusion on the questions of fact in issue.
14. ———. Considerable latitude must be allowed counsel at the commencement of a trial in making the opening statement in which he states the evidence by which he expects to sustain his cause of action or defense.
15. ———. The giving or refusing to give a cautionary instruction that the jury is not to allow sympathy or prejudice to control or affect its finding is within the sound discretion of the trial court.
16. ———. Such an instruction should be given, if requested, where the circumstances of the trial and the evidence of the case is such as is likely to appeal strongly to the sympathy of jurors.

APPEAL from the district court for Hall County: ERNEST G. KROGER, JUDGE. *Reversed and remanded.*

Wellensiek & Weaver, John A. Wagoner, and *Luebs & Elson,* for appellants.

Harold A. Prince and *Walter P. Lauritsen,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

In this action cars driven by the defendants Frank A. Smollen and Samuel M. Rank, collided in a street intersection. The defendants will hereinafter be referred to as Smollen and Rank. The Rank car proceeded beyond the point of collision, turned sharply, and went

into the yard of plaintiff's home where she was caught and pinned against the house by the Rank car.

Plaintiff sued for damages. The jury's verdict was in favor of plaintiff and against both defendants. Defendants appealed separately. The appeals are consolidated here and presented on one record.

So far as required, we state in the course of the opinion the assignments of error that are argued.

We reverse the judgment of the trial court and remand the cause for a new trial.

The street intersection involved is that of Louise and Elm Streets in the city of Grand Island. The streets were paved, the weather was clear, and the pavement was dry. The accident happened about 5:30 or 6 p.m. on March 11, 1955, in daylight.

The speed limit at the place of impact was, by ordinance, 20 miles per hour. The streets involved were well-used streets and without stop signs.

Plaintiff's home sat back from Elm and Louise Streets at the northwest corner. Just prior to and at the time of the accident plaintiff was outside her home on the east side or Elm Street side.

There was a hedge 4 or 5 feet high inside the sidewalk line and along the north and east sides of the southwest corner of the intersection. It was not in leaf. The witnesses generally agreed that it interfered with or obstructed vision across that corner.

The Rank car was proceeding north on Elm Street. The Smollen car was proceeding east on Louise Street. The cars made contact somewhere near the center of the street. The left front fender light and grill of the Smollen car were damaged. The left rear fender of the Rank car was damaged. It seems to be agreed that those places of damage fix the points of contact of the two cars. The Smollen car went on east. The Rank car proceeded north, made a sharp turn to the west and in a substantially direct west course went over a 6-inch rise in the curb, across the parking and sidewalk,

then over an eight-tenths of a foot curb on the inside sidewalk line and pinned plaintiff against her house.

Plaintiff suffered severe injuries.

The matters above recited do not appear to be in serious dispute.

Plaintiff alleged that the proximate cause of the collision which caused the Rank car to strike and injure her was the negligence of each and both of the defendants. Plaintiff alleged the negligence of Smollen to be driving in excess of the speed limit and at 35 miles per hour; failure to keep a reasonable lookout for cars approaching from his right; failure to yield right-of-way to the Rank car although the Rank car had the right-of-way; failure to keep his car under control so as to avoid a collision with an automobile approaching from the right; failure to look or if he looked, failure to see the Rank car; failure to stop although he had time to do so; and failure to apply his brakes in time to avoid a collision.

Plaintiff alleged negligence of the defendant Rank in that he was driving in excess of the speed limit and at the rate of 35 miles per hour; failure to keep a lookout for cars approaching from the west; failure to see the Smollen car that was in plain sight; failure to stop or avoid the collision although he had time to do so; failure to apply his brakes to avoid the collision; failure to guide his car so as to avoid a collision between his car and the plaintiff; and failure to apply his brakes so as to avoid striking plaintiff.

Smollen answered, denied negligence, and alleged negligence of Rank for failure to keep a proper lookout; failure to have his automobile under control; failure to yield the right-of-way to Smollen who had entered the intersection first; failure to stop after he saw or should have seen Smollen's car in the intersection; failure to turn to avoid a collision; negligence in driving his car into the car of Smollen; and failure to apply his brakes in time to avoid the collision.

Rank answered and admitted as true the allegations of plaintiff as to the negligence of Smollen, except as traversed in the answer. He denied negligence, and alleged the operation of his car at a "slow, lawful, proper and moderate rate of speed"; that he entered the intersection first; that the speed of Smollen was excessive; and that so far as he was concerned the accident was unavoidable and that he was without blame. He further alleged that as a result of the collision he was thrown against the windshield and rendered unconscious; and that the movement of his car thereafter was not caused by any conscious or voluntary act or omission on his part.

At the close of plaintiff's case-in-chief and at the close of all the evidence, each defendant moved separately for a directed verdict and later for a judgment notwithstanding the verdict. These motions are based on a contended insufficiency of the evidence to prove actionable negligence as to each defendant.

The applicable rules are:

"Where, in a jury trial, a defendant, when plaintiff rests, moves for a verdict in his favor, and upon the overruling of such motion, without protest, proceeds with the trial and introduces evidence in support of the defenses set up in his answer, he thereby waives the right to assign error in the ruling upon such motion." Bradstreet v. Grand Island Banking Co., 89 Neb. 590, 131 N. W. 956. See, also, Russell v. Electric Garage Co., 90 Neb. 719, 134 N. W. 253.

"A judgment will not be reversed for error in overruling a motion for a directed verdict at the close of plaintiff's case when certain essential testimony was not then in the record, when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record and its admission is not assigned as error here." Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130.

There is an assignment of error by Smollen as to the

admission of evidence offered by Rank. Smollen offered evidence that he was driving east just before the accident at a speed of approximately 20 miles per hour. On cross-examination he testified that this had been his constant speed for at least 2 blocks west of the point of the collision and that there were no cars immediately in front of him. Rank then produced a witness who testified that she was standing at her kitchen window in her home facing Louise Street a block and a half west of the accident intersection. She had a view of Louise Street for half a block. She saw a car go by 10 or 12 seconds before she heard the crash here involved. She saw no car ahead of or following the car she mentioned. She observed the car for a half a block. She was not able to give a particular discription of the car. She testified that a car going 20 miles an hour was not going very fast; that she would know when a car was going "around" that speed; and that she could tell by comparison whether the car she saw was going more or less than 20 miles per hour. The car was going 5 to 10 miles an hour faster than the 20 miles an hour with which she was familiar.

The applicable rules are:

"The question of the admissibility of evidence as to the speed of a vehicle shortly prior to the time of an accident rests largely in the discretion of the court." Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701.

"When the speed of a motor vehicle is charged as negligence, it is proper to admit competent evidence of the speed at which it was being driven a few seconds before the collision." Schwarting v. Ogram, 123 Neb. 76, 242 N. W. 273, 81 A. L. R. 769.

The trial court did not abuse its discretion in the admission of the evidence.

We return to the motions of the defendants for a directed verdict or for judgment notwithstanding the verdict.

The applicable rules are: "A motion for directed

verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. * * * In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him." Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569.

There is evidence in the record that would support the following findings:

Defendant Smollen approached the intersection at a rate of speed well in excess of the speed limit in the area involved; he did not look to the south when he could have seen the Rank car then approaching the intersection on his right and at a time when he could have stopped his car so as to have avoided the collision; as soon as Smollen looked and did see the Rank car he put on his brakes and skidded a distance of 40 feet to the point of impact with the Rank car; debris from the Smollen car was scattered on the pavement for a distance of several feet east of the point of impact; and the Smollen car then proceeded east a distance of 140 feet from the point of impact where it stopped with the right front wheel against the curb. Smollen then backed up to near the point of impact.

Rank approached the intersection from the south at a speed of 35 miles per hour; he did not look to the west at a point where he could have seen the Smollen car coming toward the intersection and could have stopped; when he looked and saw the Smollen car he was then almost in the intersection; and he could not then stop his car and accelerated his speed in an effort to get through the intersection ahead of the Smollen car. After the contact of the two cars, Rank then pro-

ceeded straight north a distance of about 25 or 30 feet, made a sharp turn to the west, crossed over the pavement curb, the parking, the sidewalk and sidewalk curb, and struck the plaintiff, pinning her to the house. The total distance traveled by Rank after the collision was 80 feet.

The above summary is sufficient to show that the trial court did not err in overruling the motions for a directed verdict and in overruling the motions for judgment notwithstanding the verdict.

Rank and Smollen assign prejudicial error of the trial court in the giving of instructions Nos. 1, 4, 6, and 8 on its own motion. Smollen makes no argument as to error in instruction No. 1. Instruction No. 1 is the instruction in which the court undertook to define the claims of the parties and advised that the contentions of the parties was not to be considered as evidence in the case.

The first complaint of Rank goes to the statement in the instruction that plaintiff alleged she was on the porch of her home "looking after her children" when the accident happened, and that such a reference is repeated twice in the instructions. We do not find any allegation of that kind in the pleadings. It was an erroneous statement of the pleadings and a correct statement of the fact. The evidence showed without dispute and without objection that the three children were with the plaintiff, the youngest being in a "Taylor-tot" near the plaintiff just before the accident, and that the three children were there immediately following the accident in which plaintiff was seriously injured. We find no prejudicial error in that regard. Before an error requires a reversal it must be determined that it was prejudicial to the rights of the party against whom it was made. Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466. However, as a new trial is required this is an error that need not be repeated.

Plaintiff alleged that Smollen was negligent in that he failed to yield the right-of-way to Rank who "was on

the right and had the right-of-way." Smollen by answer denied this allegation. Rank by answer admitted it. Smollen in allegation of negligence of Rank by answer alleged that he entered the intersection ahead of Rank and had the right-of-way. Rank in his answer alleged that he entered the intersection to the right of and ahead of the Smollen car.

The trial court instructed the jury that Rank contended Smollen to be negligent in that he failed to yield the right-of-way to Rank.

Rank argues here that it was his theory that he had the right-of-way and by reason thereof was not negligent, and that he was entitled to have the jury instructed on his theory of the case. As we read the instruction that was done. In addition the trial court in instruction No. 7, which is not challenged, advised the jury as to the rules where two motorists approach an intersection at or about the same time. The rule is: "Instructions not complained of in such a way as to be reviewable in this court will be taken as the law of the case, and if, when tested by such instructions, the verdict is not vulnerable to the objections lodged against it, the assignments will not be sustained." Myers v. Platte Valley Public Power & Irr. Dist., 159 Neb. 493, 67 N. W. 2d 739. We find no merit in this contention.

Rank next sets out two of the four allegations of negligence of Smollen made by plaintiff, as recited in the instruction, as to cars approaching from the right. He says the instructions were prejudicial to him but does not explain the basis of the contention. We see no merit to the contention.

Rank next complains because the court instructed the jury that plaintiff alleged Rank was negligent in that he operated his automobile at an excessive rate of speed and in excess of the speed limit fixed by ordinance. He contends that plaintiff offered no evidence as to that fact although he admits that Smollen's witnesses did directly so testify. Parenthetically it is also a fair in-

ference from the testimony of one of Rank's witnesses. This is equivalent to a contention that as to the issue of the speed of Rank the court should have withdrawn that issue from the jury. We have disposed of that contention in our ruling on the denial of the motions for an instructed verdict.

The rule is: "It is the duty of the trial court to present to the jury those issues which are raised by the pleadings and which find support in the evidence." Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831.

Rank next argues that he was entitled to the benefit of the plaintiff's admission that Rank was on the right and had the right-of-way, and that it "was an admission that the defendant Rank was not violating any speed limit at the time the accident occurred." That is a non sequitur that is self demonstrative.

Rank next complains that the trial court instructed the jury that plaintiff alleged Rank was negligent in operating his automobile at a rate of speed in excess of what was reasonable and proper under the conditions then existing. Plaintiff pleaded such an act of negligence. Rank moved that it be stricken as repetitious, surplusage, and redundant. The journal recites that the court ruled on the motion and granted leave to amend. The transcript shows that the allegation was stricken.

Rank, however, pleaded that he was operating his automobile at a "slow, lawful, proper and moderate rate of speed."

The trial court advised the jury of that allegation. The question was an issue and made so by Rank. We fail to see prejudice to Rank in the instruction.

Rank further complains that the court instructed the jury that plaintiff alleged defendant Rank was negligent in that he failed to keep a reasonable lookout for cars approaching the intersection from his left. Rank's evidence shows that he failed to look when he first could have seen the Smollen car. Rank again argues here that plaintiff alleged he had the right-of-way and he

(Rank) admitted it. The trial court in instruction No. 7 told the jury with reference to one who had a right-of-way that "if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way." No complaint is made as to that instruction. It likewise becomes the law of the case.

Rank by answer alleged that as a result of the collision he was thrown against the windshield and rendered unconscious, making it impossible for him to control his car thereafter, and that the movement of his car thereafter was not the result of any voluntary or conscious act or omission on his part. The court instructed the jury that Rank alleged that as a result of the collision he lost control of his car and was unable to stop before striking the plaintiff.

Rank contends that the court should have in instruction No. 1 informed the jury that he "had lost control by reason of being thrown against the windshield and being dazed as a result thereof." That was a question of fact for the jury on disputed evidence. In instruction No. 9 the court instructed the jury as to the liability of Rank if they found that he had been rendered unconscious as a result of the collision with the Smollen car. The instruction is not challenged here. It also becomes the law of the case. We see no merit in this contention.

Plaintiff alleged that as a result of the accident "a large part of the skin and muscles of the left leg was torn out of her" and the "bones in her knee were broken."

The evidence is undisputed that: "A. She had a laceration of the left knee and then she had a severe deep straddle laceration of—oh, I suppose you might term it the crotch would be the lay term. Q. Tell where it affected her legs? A. Well, it extended from where the thigh would join—the inner part of the thigh

would join the body and extended up into the body, oh, probably five or six inches and the skin of the buttocks was completely undermined, also to the extent of four or five inches, and the rectum on that side was opened for the entire distance and the external muscle of the rectum was torn."

Rank contends that the injury was to the body and not a separation of the left limb from the body and that to so state it exaggerated the nature of the injury. As we read the instruction it was factually correct and minimized the nature of the injury. We see no prejudice to Rank in the instruction.

Rank asserts that the statement that the bones in her knee were broken was not a correct statement. The undisputed evidence is: "The inner ball or inner half ball of the knee was just split right through and just lays right there in place." The trial court accurately stated the allegation as "bones * * * were broken." The evidence is a bone was broken. We fail to see prejudice to Rank in the instruction.

Earlier in this opinion we have referred to the fact that plaintiff in her allegations of negligence of Smollen alleged that Smollen failed to yield the right-of-way to Rank "who was on the right and had the right-of-way" and that Rank admitted that allegation. Plaintiff by reply accepted this admission and admitted Rank's allegation that Smollen was negligent.

The trial court made no reference to these admissions in its instructions. We fail to see where Rank was prejudiced. He points out no prejudice.

If erroneous, the established rule is: "Erroneous instructions to the jury will not work a reversal of a case unless they are prejudicial to the complaining party." In re Estate of Keup, 145 Neb. 729, 18 N. W. 2d 63.

Rank's assignment and argument directed at instruction No. 1 are not sustained.

In instruction No. 4 the trial court instructed the

jury that the burden of proof was on the plaintiff to show the negligence charged against the defendants.

The jury was then instructed that the burden of proof was on the defendant Rank to show the negligence which he charged against Smollen unless such negligence was disclosed by the evidence of Smollen and that such negligence was a proximate cause of plaintiff's injuries; and that a like burden was on Smollen to prove the evidence which he charged against Rank.

Both Rank and Smollen assigned this as error.

The trial court had advised the jury that Smollen charged Rank with negligence as a sole and proximate cause in that he failed to keep a lookout and failed to keep his automobile under reasonable control.

The court had instructed the jury that Rank had charged that the sole cause of the accident was the negligence of Smollen in that he operated his car at an excessive rate of speed in violation of the ordinance and that he failed to yield the right-of-way to Rank who approached the intersection from Smollen's right. Neither Smollen nor Rank prayed for affirmative relief against the other.

We think this instruction was erroneous and prejudicial, and requires a reversal of the judgment and a remand for a new trial.

The rule is: "In the absence of an issue of negligence by plaintiff or by a third person imputable to plaintiff, allegations in an answer denying that defendant was negligent and alleging that the accident and resulting damages were solely and proximately caused by the negligence of such third person is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto, but rather is one entirely consistent with and provable under the general issue." Umberger v. Sankey, 151 Neb. 488, 38 N. W. 2d 21. See, also, Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333; Styskal v. Brickey,

158 Neb. 208, 62 N. W. 2d 854; Burhoop v. Brackhan, *ante* p. 382, 82 N. W. 2d 557.

Both Rank and Smollen assign the giving of instruction No. 6 as error. Smollen does not mention it in argument. Instruction No. 6 set out the speed limit of the city of Grand Island as fixed by ordinance. It is literally correct.

Rank argues that the instruction is erroneous in that it does not advise the jury that its violation was not in itself negligence, but is evidence of negligence. He cites no cases wherein we have held that it is error to fail to include such a statement. We need not decide that question.

The rule is: "Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof." Bell v. State, 159 Neb. 474, 67 N. W. 2d 762.

Instruction No. 7 sets out the "laws" of Nebraska as to right-of-way of motorists approaching an intersection at or about the same time. It refers to motorists traveling at "a lawful rate of speed." The second paragraph refers to the right-of-way of a vehicle which has entered an intersection and is passing through "at a lawful rate of speed." The third paragraph is: "The violation of any of these laws is not of itself negligence, but is evidence which you are to consider * * *."

Rank's contention is that by the use of the word "laws" the last-quoted statement does not apply to the ordinance and hence the instruction does not apply to the instructions as to the ordinance fixing the speed limit.

This contention is obviously without merit. The reference to "a lawful rate of speed" in instruction No. 7 clearly refers to the speed limit as set out in instruction No. 6 and makes the last provision applicable to both. So construed the instructions are complete on the matter covered. The assignment has no merit.

Both Rank and Smollen assign the giving of instruction No. 8 as error. Rank does not point out error in his argument. Smollen mentions it only in connection with his argument as to instruction No. 4. Under rule 8a 2 (4) of the Supreme Court rules, this assignment is not considered.

This concludes the assignments of error in which Smollen joins. The remaining assignments are those of Rank.

Rank assigns error in the refusal to give requested instruction No. 6. He concedes that instruction No. 8 which was given was intended to cover the situation but contends that the instruction given placed the burden on each defendant to show that the other was negligent. He does not point out the language that he contends produced that result. We find no language that even by inference does so. He contends further that the instruction does not correctly reflect the law as stated in Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673. He argues the facts of the Bergendahl case and the facts, as he sees them, in the instant case. He does not point out error in the instruction. The assignment is without merit.

Rank assigns error of the trial judge which he complains altered the effect of the importance of evidence and the credibility of witnesses. In part the matters here mentioned are repetitious of questions earlier argued and here decided. The specific assignment here relates to the examination of the witness offered by Rank which directly contradicted evidence of the plaintiff. The witness testified as to his place of employment by name and street address, and that he was on his way to work when he observed the things about which he testified. He was cross-examined by both plaintiff and Smollen. The court then asked the witness where he worked, if he was on his way to work, and if he was going out of his way. The witness explained why he was on the particular street at that time.

It is obvious that the court recognized that an infer-

ence of false testimony could be drawn and that the examination was directed to that situation.

We have held: "It is entirely proper for the trial judge to aid in preventing misconception by properly directed questions or remarks." Culver v. Union P. R. R. Co., 112 Neb. 441, 199 N. W. 794.

We have further held: "We see no impropriety in a trial court interrogating witnesses regarding a fact under investigation, when the tendency is only to develop the truth, and is calculated in nowise to influence the jury, save as the testimony will assist them to arrive at a correct conclusion on the questions of facts in issue." Leo v. State, 63 Neb. 723, 89 N. W. 303.

The holdings are applicable here. We see no basis for Rank's contention of prejudicial error in this matter.

Rank complains of error in the court not sustaining a motion for mistrial made at the close of the opening statements to the jury. As settled, only the remarks of counsel to which objections were made and rulings thereon were included in the bill of exceptions.

At one point in the opening remarks, Rank objected to "argument" and the court advised counsel not to argue. Some pages later counsel for plaintiff referred to the fact of plaintiff's pregnancy at the time of the accident and that because of the fractured pelvis the child was delivered by Caesarean operation. Rank objected that it was not an issue and the court ruled with him "Unless it is claimed that that caused additional pain and suffering * * *." The court then said to "go on and leave that out of your statement." Several pages later the statement was made that plaintiff had a broken pelvis and that she had not recovered completely from that. The court then admonished counsel to limit his statement to matters pleaded. No further objection by Rank was made.

After opening statements were completed, Rank moved for a mistrial on the ground that counsel had recited evidence broader than the pleadings. The court over-

ruled the motion and admonished the jury that statements made in the opening by counsel are not evidence and are to be disregarded and not considered. Rank assigns this as prejudicial error.

Apparently counsel for plaintiff and the court did not agree on the evidence that was admissible under the issues presented. The court undertook to keep out reference to evidence which might later be offered and then held to be incompetent. During the trial repeated reference was made to the pregnancy of plaintiff and the treatment that was required because of it. Repeated evidence was offered as to the broken pelvis. The court rejected a direct offer of proof as to the Caesarean operation.

The rule is: "Considerable latitude must be allowed counsel at the commencement of a trial in making the opening statement in which he states the evidence by which he expects to sustain his cause of action or defense." Yechout v. Tesnohlidek, 97 Neb. 387, 150 N. W. 199.

We find no prejudice to Rank particularly in consideration of the fact that the court directly and clearly admonished the jury in the matter.

The bill of exceptions contains one isolated statement of counsel for plaintiff made in argument to the jury. It is: "He says don't pay any attention to sympathy. Now, you do pay attention to sympathy. If she has received a condition that makes you cry your eyes out for her, then you sympathize for that condition and you give her the money that will pay her for that condition. If she is in a condition that does not merit sympathy for them, why don't give her money for that, but if she is in a condition that merits sympathy, she is in a condition to be paid for it."

Rank moved for a mistrial. It was overruled. Rank claims this was prejudicial error as an appeal to the jury for sympathy.

This is a case where a suggestion of an appeal to

sympathy should not have been made. The statement made that suggestion if not direct appeal for sympathy. Such an argument was improper and constituted prejudicial error under the circumstances of this case.

Defendant Rank requested an instruction to the effect that the jury should not take into consideration any element of sympathy or pity for the plaintiff or criticism or prejudice against the defendants or either of them. The trial court refused the instruction. Rank assigns the refusal to give the instruction as error.

Here Rank restates his argument as to various matters specifically assigned as error and heretofore referred to herein. He refers to one additional matter not separately assigned as error. During the trial a newspaper carried a news item regarding the trial. Rank offered it in evidence and moved for a mistrial. The court overruled the motion and pointed out to the jury certain inaccuracies in the item and admonished the jury to listen to and act on that which was testified to in court and that alone.

Rank contends that the sum total of all of these matters adds up to a requirement that a cautionary instruction on sympathy and prejudice should have been given and that it was prejudicial error not to do so.

The applicable rule is: The giving or refusing to give a cautionary instruction that the jury is not to allow sympathy or prejudice to control or affect its finding is within the sound discretion of the trial court. Hoskovec v. Omaha Street Ry. Co., 85 Neb. 295, 123 N. W. 305; Copeland v. Omaha & C. B. St. Ry. Co., 98 Neb. 42, 151 N. W. 947; Blackwell v. Omaha Athletic Club, 123 Neb. 332, 242 N. W. 664.

Plaintiff, at the time of the accident, was 24 years of age, married, and the mother of three children.

We have heretofore quoted the evidence as to the torn and bruised area in the crotch; her pelvis was fractured; and she had a sacroiliac dislocation and the fractured, torn left knee. These were the major injuries.

The first night at the hospital she was in shock and was given 8 to 11 pints of blood by transfusion. That night began a series of operations, not yet ended at the time of the trial. The number of the operations performed depends on whether the series of things done were classed as operations or surgical treatments. She was in the hospital for 96 days. During all of that time she was in pain, described at one time as excruciating by her surgeon. She was under the influence of narcotics administered to relieve pain from 2 to 4 hours apart for weeks on end during most of this time.

During that time she underwent a personality change where the doctors feared she was going insane from the memory of the accident, the pain, and the fear of operations. That condition had improved at the time of the trial, but still remained with her.

Several operations were performed on the knee and the pelvis area to restore the fractured bones. This ultimately resulted in putting pegs in the bones to get traction. She was in traction for that purpose for several weeks.

Infection developed in the torn crotch area resulting in an abscess. To remove a cause of infection a colostomy was performed on March 26, 1955, 2 weeks following the accident. On August 30, 1955, following the accident the reverse operation was performed putting the bowel and the functioning of the rectum back in its proper place. The leg is left in a deformed position permanently. At the time of the trial another knee operation was anticipated to remove the cause of continuing weakness and pain there. The doctors testified that the final result would be a fixed knee or, as we interpret it, a stiff leg from the hip to the ankle.

The above in broad outline is the undisputed evidence of the plaintiff's physicians and surgeons.

The injuries of the plaintiff were such as obviously would appeal strongly to the sympathy of jurors. This coupled with the circumstances connected with the trial

mentioned herein were such as required the giving of the cautionary instruction, the request having been made for it, and failure to do so was prejudicial error. See, Copeland v. Omaha & C. B. St. Ry. Co., *supra;* 88 C. J. S., Trial, § 320(b), p. 848.

The jury returned a verdict for the plaintiff against both defendants in the sum of $35,500. Rank assigns as error that the verdict is excessive and was given under the influence of passion and prejudice.

A reversal and new trial being required, we need not determine this assignment. It can have no bearing at a new trial.

The judgment of the trial court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

MARTIN W. O'NEILL, APPELLEE, V. WINIFRED O'NEILL, APPELLANT.
83 N. W. 2d 92

Filed May 24, 1957. No. 34116.

1. **Divorce: Appeal and Error.** A decree of divorce granted on the uncorroborated testimony of a party which has been appealed on that ground requires reversal by this court.
2. **Divorce: Attorney and Client.** Attorney's fees are not allowable in an action for divorce in the absence of statutory authority therefor.
3. ———: ———. The statutes of this state contain no provision for the allowance of attorney's fees in an action for divorce in favor of a husband and against a wife.
4. ———: ———. The courts are without authority in an action for divorce to fix the amount of the attorney's fees the parties are to pay their respective attorneys.

APPEAL from the district court for Douglas County: HERBERT RHOADES, JUDGE. *Reversed and remanded.*

Schrempp & Lathrop, for appellant.

Irvin C. Levin and *Jerry M. Gitnick,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action for divorce by Martin W. O'Neill, plaintiff and appellee, against Winifred O'Neill, defendant and appellant. In the action the plaintiff filed a petition for divorce from the defendant on the ground of extreme cruelty. The defendant filed a cross-petition wherein she asked for a decree of divorce from the plaintiff likewise on the ground of extreme cruelty.

The case was tried, at the conclusion of which the prayer of plaintiff's petition for divorce was granted and that of defendant denied. Accordingly a decree was rendered. Prior to the trial the defendant had been represented in the case in the following order by John S. Samson and Cranny & Moore. On the trial she was represented by William J. Hotz, Jr. The plaintiff was represented by Irvin C. Levin.

The court found, among other findings, that there was a balance in an account in the Omaha Loan and Building Association in the amount of $1,274.32 which represented an accumulation of the savings of plaintiff and defendant which stood in the name of the defendant. By the decree it was directed that $300 of this amount should be paid to John S. Samson for his services, that $100 should be paid to Cranny & Moore, that $150 should be paid to William J. Hotz, Jr., and that $400 should be paid to Irvin C. Levin.

From the decree the defendant has appealed. As grounds for reversal the defendant has set forth two assignments of error. The first is that the court erred in granting plaintiff a decree of divorce. The second is that the court erred in ordering the attorneys' fees paid from the savings account.

The point of the first assignment of error is that there is no corroboration of the testimony of plaintiff as to any charge of cruelty made against the defendant.

From an examination of the record and the law applicable thereto the only conclusion possible is that the assignment of error must be sustained.

In an effort to sustain his alleged cause of action the plaintiff testified in his own behalf. The substance of his testimony was that the defendant constantly nagged him; that she would not allow members of plaintiff's family to visit in the home of the parties; that she did not properly cook and provide meals for him; and that she filed a complaint against him with the board of mental health of Douglas County, Nebraska.

There was no corroboration whatever of the testimony of the plaintiff in any of these respects. A decree of divorce granted on the uncorroborated testimony of a party must on appeal be reversed.

Section 42-335, R. R. S. 1943, provides: "No decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose." This rule has been approved and applied by numerous decisions of this court. See, Spray v. Spray, 156 Neb. 774, 57 N. W. 2d 926; Hines v. Hines, 157 Neb. 20, 58 N. W. 2d 505.

The second assignment of error, as pointed out, challenges the propriety of the decree requiring the payment of attorney's fees out of funds on deposit in the name of the defendant. The propriety of the allowance of the fees as such is not challenged. The complaint made is that they could not properly be charged against this fund.

It should be said here that there is nothing in the record which competently shows that these funds were not funds in actuality belonging to the defendant. The defendant testified that they belonged to her and that the plaintiff did not contribute to them in anywise. There is nothing in the evidence on which to base a finding that this is not true.

The decree was rendered herein on March 28, 1956. Prior thereto John S. Samson had been attorney for the defendant but had withdrawn. Incident to his withdrawal he had been awarded a fee for his services in the amount of $300. The award of the decree in the amount of $300 in favor of Samson was a reaffirmation of the earlier award of $300. The award was neither against the plaintiff nor the defendant. The order provided only that it should be paid out of the fund on deposit with the Omaha Loan and Building Association "belonging to the parties herein standing in the name of the defendant." The Omaha Loan and Building Association was not made a party to the proceeding in which it was required to pay out money in its possession. Thereafter for a period of time it appears that the defendant was represented by the law firm of Cranny & Moore. This firm apparently withdrew since William J. Hotz, Jr., represented the defendant at the trial. Apparently no attorney's fee was allowed in favor of Cranny & Moore or Hotz prior to the entry of the final decree. Irvin C. Levin, as pointed out, was at all times attorney for the plaintiff.

By the terms of the decree none of the amounts allowed as attorney's fees, that is $300 for John S. Samson, $100 for Cranny & Moore, $150 for William J. Hotz, Jr., and $400 for Irvin C. Levin was made a charge against the plaintiff or the defendant. The charge was made against the fund on deposit in the Omaha Loan and Building Association. The effect however, on the record, if carried out, would be to charge the defendant, a wife in a divorce action, by order of court, with the payment of the fees for her attorneys and also the fees for the attorney for the husband.

The first point flowing from this which will be considered is that of whether or not there is any authority in the law of this state to allow an attorney's fee in favor of a husband in an action for divorce. We have found no authority either in the statutes or the deci-

sions of this court. Pursuant to the terms of section 42-308, R. R. S. 1943, this court has held that attorney's fees may be allowed a wife to enable her to carry on or defend a suit. Lippincott v. Lippincott, 152 Neb. 374, 41 N. W. 2d 232. It has not been held however that allowance for this purpose may be made in favor of a husband.

Under the terms of the statute costs may be taxed to either party but authority is not granted to tax suit money which includes attorney's fees against a wife.

The general rule is that it is only where there is a statute authorizing it that an attorney's fee may be allowed for the husband in an action for divorce. 27 C. J. S., Divorce, § 217, p. 912. See, Peters v. Peters, 172 Okl. 575, 46 P. 2d 487; State ex rel. Jacobson v. Superior Court, 120 Wash. 359, 207 P. 227, 24 A. L. R. 488. We think the general rule should be regarded as appropriate.

In this view it must be said that the court was without power to impose the fee for plaintiff's attorney upon the defendant directly or indirectly.

The second point relates to the other three fees which were allowed or those which were allowed in favor of the attorneys for the defendant. If it be assumed that it was the intention of the court to make them a charge against the plaintiff but payable out of the fund in question such intention could not properly be effected. To do this would in actuality be to transfer to the defendant the obligation imposed by the court upon the plaintiff pursuant to the provisions of section 42-308, R. R. S. 1943, to pay fees for the attorneys for the defendant. No provision of statute and no decision has been cited or found permitting this to be done.

If it be assumed that it was the intention of the court to fix the fees of the defendant's own attorneys and to render judgment in their favor against her in this action for divorce and to order satisfaction out of her property the action of the court in so doing must be regarded as being without authority of law.

It is the rule that the legislative authority of the state

has full control over the mode, manner, time and place of the proceedings for divorce and generally of the procedure in actions for divorce. See 27 C. J. S., Divorce, § 9, p. 531. No legislation has been enacted by the Legislature of this state granting the power involved in this assumption. In Nickerson v. Nickerson, 152 Neb. 799, 42 N. W. 2d 861, it was said: "There is no authority for a court, in a divorce action, to fix the amount of the attorney fees each party is to pay their respective attorneys."

The decree of the district court is reversed and the cause is remanded with directions to dismiss the action. An attorney's fee is allowed in favor of the defendant and against the plaintiff for the services of her attorney in this court in the amount of $300.

REVERSED AND REMANDED.

ELMER HOFFMAN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

83 N. W. 2d 357

Filed May 24, 1957. No. 34120.

1. **Criminal Law.** It is only where there is in fact no preliminary examination upon a criminal charge, either in form or substance, that a plea in abatement may successfully be directed to the sufficiency of such hearing.
2. **Habeas Corpus.** The sufficiency of evidence adduced at a preliminary hearing to hold an accused to answer for a crime with which he is charged may be raised and tried in habeas corpus proceedings.
3. **Embezzlement.** Under section 28-538, R. R. S. 1943, the failure of an agent to deliver property entrusted to his care to the proper person upon demand is prima facie proof of an intent to embezzle.
4. **Indictments and Informations.** Where a crime created by statute may be committed by any of several methods set forth in the statute, the information may charge in a single count that it was committed by any or all of the enumerated methods if they are not inconsistent with or repugnant to each other.

5. **Embezzlement.** Embezzlement is the fraudulent appropriation or conversion of another's money or property by a person to whom it has been entrusted or into whose hands it has lawfully come by virtue of his employment with the felonious intent to defraud or deprive the owner thereof.
6. ———. Conversion of the property alleged to have been embezzled to the personal use of the person charged is not an essential element of the crime of embezzlement.
7. **Embezzlement: Evidence.** The falsification of books and records and misrepresentations of fact for the purpose of concealing shortages of money or property entrusted to the defendant's care is competent evidence that such actions were done with a felonious intent.
8. **Appeal and Error.** A defendant may not predicate error on the admission of evidence to which no objection was made at the time it was offered.
9. **Embezzlement: Trial.** In a prosecution for the embezzlement of gasoline, the amount to be allowed for normal shrinkage is a jury question.
10. **Embezzlement: Evidence.** Where evidence is adduced in such a prosecution that a gasoline tank used by the defendant was found to be leaking on a date subsequent to the period in which the embezzlement is charged, it is admissible as a circumstance to be considered by the jury in determining if there was a reasonable doubt as to the guilt of the defendant.
11. ———: ———. In such a case evidence of shortages of other products which suffered no loss by leakage is admissible as bearing upon the question of whether or not the shortage of gasoline resulted from a felonious act of the defendant or otherwise.
12. **Embezzlement: Trial.** An error by the jury in calculating the amount embezzled is not material where it does not have the effect of changing the punishment of the defendant to his prejudice.

ERROR to the district court for Saline County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Merril R. Reller and *John McArthur*, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer L. Kyle*, for defendant in error.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

In this case the State prosecuted the plaintiff in error, Elmer Hoffman, hereinafter referred to as the defendant, on a charge of embezzlement under section 28-538, R. R. S. 1943. The jury returned a verdict of guilty and the trial court sentenced the defendant to serve a term of not less than 2 years nor more than 3 years in the State Reformatory for Men. The defendant brings the case to this court for review.

The substance of the complaint filed against the defendant was "that Elmer Hoffman, in the County of Saline and State of Nebraska, there being an agent of the Farmers Elevator Company, a corporation, of Wilber, Saline County, Nebraska, to-wit: manager of the said Farmers Elevator Company's gasoline and oil station, and not being an apprentice nor a person within the age of eighteen years, did then and there, beginning on or about the 1st day of January, 1954, and continuously thereafter until, and including the 15th day of June, 1955, by a series of acts during the same employment, wilfully and unlawfully, feloniously, fraudulently and continuously, without the consent of his employer, embezzle certain personal property, to-wit: 57,000 gallons of gasoline, the same being the property of the said Farmers Elevator Company, of the value of $11,400.00, which gasoline came into the possession and care of the said Elmer Hoffman by virtue of and under color of his employment as manager of the aforesaid Farmers Elevator Company's gasoline and oil station, with the intent of him, the said Elmer Hoffman, to defraud the Farmers Elevator Company, a corporation, of the value of the same, * * *."

The defendant complains of the action of the district court in overruling his plea in abatement. The basis of the plea was that the evidence was insufficient to show that an offense was committed or that the defendant probably committed it. When the sufficiency of a preliminary hearing is called in question by a plea in

abatement, "the only question to be considered is with reference to the powers of the magistrate which are called into action in the determination of what shall be the result of such hearing. If he is compelled to act judicially, and to determine as a judicial question the matters over which he has jurisdiction, and does determine such questions upon competent evidence, then an error in judgment as to the result reached can not be determined by a plea in abatement. It is only where there is in fact no preliminary examination, either in form or substance, that advantage can be taken of by such a plea." Jahnke v. State, 68 Neb. 154, 94 N. W. 158.

"It is the rule in this jurisdiction that the sufficiency of the evidence adduced at a preliminary examination to hold an accused to answer for a crime with which he has been charged may be raised and tried in habeas corpus proceedings." Birdsley v. Kelley, 159 Neb. 74, 65 N. W. 2d 328. See, also, State ex rel. Flippin v. Sievers, 102 Neb. 611, 168 N. W. 99; Jahnke v. State, *supra*. The evidence shows that a preliminary hearing was held in which evidence was taken and submitted. The evidence was clearly sufficient to invoke the judgment of the court on a matter over which it had jurisdiction. This constitutes a preliminary hearing sufficient to defeat an attack upon it by plea in abatement. The trial court correctly overruled the plea.

A motion to quash the information on the same grounds as were advanced in the plea in abatement was also made. They afford no grounds for a motion to quash the information and the trial court properly overruled it.

The case was tried to a jury in the district court for Saline County. The evidence adduced at the trial is sufficient to sustain the following findings of fact. The Farmers Elevator Company is a corporation and the defendant was the manager of its gasoline and oil station at Wilber, Nebraska, from January 1, 1954, to June

15, 1955, the period in which the embezzlement is alleged to have occurred. Defendant had been the manager of the station since 1943 and at the time of the trial was about 38 years of age. As manager of the station it was the duty of the defendant to make purchases, pay bills for fuels, oils, and accessories, and keep the books and records of the company, including the making and recording of inventories. On June 15 and 16, 1955, the company caused an audit to be made of the books and records of the gasoline and oil station. It was determined that between January 1, 1955, and June 15, 1955, there was a shortage of gasoline in the amount of 20,847 gallons. During this period the daily sales of gasoline were overfooted an even 100 gallons per day on so many days that it could be described as a common practice. A subsequent audit commencing with January 1, 1954, was made which revealed a shortage of 55,893 gallons of gasoline, the value of which was between 20 and 23 cents per gallon, depending upon the grade of the gasoline. The auditors appeared and testified as to their findings, all of the books of the station which they examined being in the courtroom subject to examination by the defendant, in accordance with the rule announced in Hogoboom v. State, 120 Neb. 525, 234 N. W. 422, 79 A. L. R. 1171. The evidence shows also that the Farmers Elevator Company, by its president, secretary, and attorney, made a formal demand upon the defendant at his home in Lincoln, Nebraska, on August 8, 1955, to refund approximately 57,000 gallons of gasoline which came into his possession and was unaccounted for. There was no compliance with the demand. There was evidence that the corporation through its officers did not consent to the appropriation of any gasoline by the defendant.

There is evidence in the record that defendant falsified three inventories made by him and recorded in the inventory record to conceal the existing shortages. The record shows also that defendant overfooted his

accounts receivable in excess of $2,800. When the audit was commenced defendant falsely informed the auditor that there were no unrecorded liabilities, when in fact there were liabilities outstanding in the amount of $5,001.85. The invoices making up this amount were recent and would not necessarily be entered on the books of the company in the usual course of business at the time the inquiry was made. It was the false statement and not the failure to enter them on the books of the company that appears to be material here. The evidence shows that records made by an assistant while defendant was on vacation were completely changed by the defendant on his return. The evidence shows further that defendant did not at any time report any shortage of gasoline to the officers or directors of the corporation. The record shows that the defendant did not take the stand nor produce any other evidence.

There is evidence that two carloads of gasoline of 5,085 gallons each were charged to kerosene and distillate. The evidence is that the 10,170 gallons of gasoline was received and, though charged as other products, it was in no way accounted for. It was clearly gasoline which came into the possession of defendant and for which he should account.

It is the contention of the defendant that the conviction cannot stand for the reason that the evidence does not show that defendant fraudulently and feloniously converted any gasoline to his own use. In this respect we point out that in 1915 the Legislature amended what is now section 28-538, R. R. S. 1943. The amendment as it now appears in part provided: "The failure, neglect or refusal of such officer, attorney at law, agent, clerk, servant, factor or commission agent, as hereinbefore in this section enumerated to pay, deliver or refund to the proper person, company or copartnership such money, goods or property, entrusted to his or her care or which shall come into his or her possession, upon demand, shall be prima facie proof of in-

tent to embezzle." Under this statute, when other elements of the crime of embezzlement have been established, it is not necessary to offer other evidence of intent to embezzle where a proper demand has been made. The statute creates a prima facie case on the question of intent to embezzle under such circumstances and, in the absence of any evidence on the subject, is sufficient to take the case to the jury. In Bolln v. State, 51 Neb. 581, 71 N. W. 444, a prosecution for embezzlement applicable to public officers in which the statute provided that a refusal to account to a successor in office would constitute prima facie evidence of embezzlement, we said: "To establish embezzlement it did not devolve upon the state to show how or where the moneys were converted by the defendant to his own use. The proof adduced by the state in support of the ninth count is fully as convincing, and is ample to sustain the averments of said count. The state, by uncontradicted testimony, traced the $3,000 of the school money therein mentioned into the hands of the defendant, and he failed and refused to account for the same in any manner whatever." The foregoing case was followed in Whitney v. State, 53 Neb. 287, 73 N. W. 696.

The crime of embezzlement is a statutory crime in this state. The statute, section 28-538, R. R. S. 1943, states at least three ways in which the crime may be committed. For the purposes of the case before it the trial court properly defined the crime of embezzlement in its instructions to the jury as follows: "Embezzlement is the fraudulent appropriation or conversion of another's money or property by a person to whom it has been intrusted or into whose hands it has lawfully come by virtue of his employment, with the felonious intent to defraud or deprive the owner thereof." The contention that conversion to the defendant's use is an essential element of embezzlement cannot be sustained. In the present case the defendant was charged with embezzling certain described property. He was not charged with

the conversion of property to his own use. In Winkelmann v. State, 114 Neb. 1, 205 N. W. 565, this court said: "It may be fairly said that the term 'embezzlement' includes the idea of abstracting and misapplying the funds of another." In the first paragraph of the syllabus, the court summarized its holding as follows: "Where a crime created by statute may be committed by any of several methods set forth in the statute, the information may charge in a single count that it was committed by any or all of the enumerated methods if they are not inconsistent with or repugnant to each other." The trial court's definition of embezzlement was correct. The State was not required to allege or prove that defendant converted the property to his own use. 29 C. J. S., Embezzlement, § 11 b, p. 682. We conclude under the reasoning and holding of the foregoing authorities that a prima facie case of intent to embezzle was made and that it was sufficient to take the case to the jury.

The defendant asserts that the evidence is not sufficient to sustain a finding by the jury of a felonious intent to deprive the Farmers Elevator Company of its gasoline. To sustain the conviction of an agent for embezzling the property of his principal, the facts must warrant the conclusion that such appropriation was made by the agent with a felonious intent. Hamilton v. State, 46 Neb. 284, 64 N. W. 965. It must be borne in mind that the intent with which an act is done is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant, viewed in the light of all the surrounding circumstances.

The record in this case shows a shortage of 55,893 gallons of gasoline during the period in which the embezzlement was charged. It shows that defendant falsified three inventories, a large number of daily sales records, and the accounts receivable. He falsely informed the company's auditor that there were no un-

recorded liabilities. He admitted that he falsified the inventories and books. He never at any time reported any losses of gasoline to the company or its officers. We think that these facts are such that it is within the province of the jury to determine with what intent the act was done. Buckley v. State, 131 Neb. 752, 269 N. W. 892. We think the falsifying of the records and the misinformation given to the auditor, together with all the circumstances surrounding the case, constitute sufficient evidence to sustain the jury's finding that a felonious intent existed.

The defendant urges that the conviction in the present case was wholly upon circumstantial evidence and that the facts do not exclude every hypothesis other than of guilt. There is ample direct evidence from which the jury could find the defendant to be guilty. The court, however, gave an instruction on the weight to be given to circumstantial evidence to which no exception has been taken by the defendant. The contention that the verdict is based upon speculation and conjecture only cannot be sustained. The falsifying of records day after day and the false statements made to the company's auditor are clear evidences of fraud and a felonious intent. Unexplained, they point towards guilt. Human experience is that an innocent agent does not falsify records and facts to conceal unusual losses from his principal. It is a badge of fraud and evidence of a felonious intent. Such evidence is direct and not circumstantial. It is the usual way of establishing the intent with which an act is done. The jury could well say, as it did, that the acts of the defendant were done with a felonious intent.

The defendant assigns as error the admission in evidence of purported admissions or confessions by the defendant's wife. This assignment is directed to the evidence of Albert Chmelir, the president of the company, who testified that at the time he made demand upon the defendant for the 57,000 gallons of gasoline the de-

fendant's wife said: "Albert, do you want Elmer to pay all when others were involved?" Two other persons accompanying Chmelir testified to the same statement. The record shows that no objection was made to the evidence of any one of these three witnesses. It is fundamental that error may not be predicated on the admission of evidence to which no objection was made. There is no merit in this assignment.

On cross-examination of the auditor employed by the State, counsel for the defendant inquired whether an allowance had been made for shrinkage. The auditor testified that he allowed 1 percent for shrinkage. Before completing his cross-examination, he indicated that shrinkage might run as high as 3 percent, although he disqualified himself as an expert on that question. The question of shrinkage was clearly one for the jury to determine under the evidence.

The defendant contends that a reasonable doubt as to his guilt arose as a matter of law because of evidence adduced concerning a leaky gasoline tank. The evidence shows that the shortage of 55,893 gallons of gasoline occured between January 1, 1954, and June 15, 1955. The defendant left the service of the company on July 8, 1955. The evidence is that sometime prior to December 6, 1955, a leaky gasoline tank was suspected. An engineer from the Omaha Testing Laboratory was employed to check the company's tanks. He commenced his tests on December 6, 1955, and completed them about April 7, 1956. The testing engineer's report showed that one of four underground gasoline tanks was leaking. For the 30 days following December 6, 1955, the tank leaked 1,800 gallons of gasoline. The defendant asserts that the leaky gasoline tank casts such a doubt upon the guilt of the defendant that defendant's motion for a directed verdict should have been sustained.

We point out that the leaky gasoline tank was not discovered until almost 2 years after the defendant commenced falsifying the company records to conceal short-

ages of gasoline. There is not one word of evidence that any leakage occurred during the period the embezzlement was alleged to have occurred. There is not even any evidence that the leaky gasoline tank was in use or that it had any gasoline in it during the time the defendant was charged with embezzling gasoline. The leaky tank was not discovered until 4 or 5 months after defendant left the service of the company. The treasurer of the company testified that no abnormal loss of gasoline occurred after the defendant left the service of the company until the leaky tank was suspected sometime before December 6, 1955.

The charge in the present case was for the embezzlement of gasoline. There was no charge that defendant embezzled kerosene, tractor fuel, or distillate. The audit revealed large shortages of these products. As an example, the audit shows that from May 24, 1955, to June 11, 1955, defendant overfooted the sales of tractor fuel an even 100 gallons on each of 10 different days. The audit further shows that from January 1, 1955, to June 15, 1955, there was a shortage of 7,199 gallons of kerosene, 2,757 gallons of tractor fuel, and 9,569 gallons of distillate. There was no evidence that any tanks containing these fuels had ever leaked. A leaky gasoline tank could in no manner account for the shortages in these fuels. The jury had the right to consider these facts in determining whether the loss of gasoline resulted from leakage.

It is the contention of the defendant that the losses by leakage occurring after December 6, 1955, should be related back to the period commencing January 1, 1954, and ending on June 15, 1955, and credited against the amount charged to have been embezzled as a matter of law and thus create a reasonable doubt, at least, of the guilt of the defendant. Such a credit would be nothing less than pure speculation and conjecture. No objection was raised to the evidence of leakage, in fact it was put in evidence by the State. Its admissibility

rests on the fact that it is a circumstance which the jury might consider in determining whether or not there was a reasonable doubt as to the guilt of the defendant. But it is only a circumstance which the jury could consider in arriving at a verdict. It presents no situation requiring the direction of a verdict and the trial court was clearly right in overruling such motion.

Defendant contends that the finding of the jury that he was guilty of embezzling 57,000 gallons of gasoline of the value of $11,400 is not sustained by the evidence and has the effect of vitiating the verdict. The maximum amount of gasoline shown by the evidence to have been embezzled is 55,893 gallons. We point out in this connection that the purpose in having the jury determine the value of the embezzled property is to enable the court to fix the penalty. The penalty provided by section 28-538, R. R. S. 1943, is as follows: "* * * every such person so offending shall be punished in the manner provided by law for feloniously stealing property of the value of the article so embezzled, * * *." Grand larceny is the stealing of property of the value of $100 or upwards. § 28-506, R. R. S. 1943. Petit larceny is the stealing of property of less value than $100. § 28-512, R. R. S. 1943. Consequently, in a prosecution for embezzlement the jury must fix the value in order to determine if the penalty for grand or petit larceny applies. The fact that the finding of the jury as to the amount and value of the property embezzled exceeds that which the evidence will sustain is not material where the variance does not operate to change the penalty. The amount which the evidence sustains has a value in excess of $100. It is not contended that its value was less than that amount. No prejudice resulted to the defendant. The fixing of the value of the property embezzled is not an element of the crime of embezzlement, it goes only to the penalty.

In Young v. State, 44 Ohio App. 1, 184 N. E. 24, a similar situation arose. The defendant was charged

with embezzling $46,948. The jury found that he embezzled $22,090. The court found that the evidence would sustain a finding that defendant embezzled $9,311.76 only. The court then stated: "In any event, the jury was justified in finding the amount embezzled to be more than $35, and, if it was more than that amount, the crime was a felony, and the amount of the embezzlement could have no effect on the punishment to be inflicted. If any error was committed by the jury in fixing the amount embezzled, it could not prejudice the rights of the defendant, nor in any way affect the punishment."

Defendant contends the sentence of the court is excessive. The sentence was from 2 to 3 years in the State Reformatory for Men. The statutory penalty is from 1 to 7 years in the Nebraska State Penitentiary. We find no reason to interfere with the discretion exercised by the trial court in imposing the penalty that it did.

A consideration of the entire record and the assignments of error here made disclose that no prejudicial error occurred, that defendant had a fair trial, and the judgment should be affirmed.

AFFIRMED.

SIMMONS, C. J., dissenting.

I disagree with certain statements of the evidence made by the court. That disagreement goes to lack of detail and definiteness in most instances and will not be developed here.

I limit this dissent to two matters. The first is the complete lack of any evidence that the defendant converted or appropriated any gasoline or other property of the elevator company. There is a failure of proof of an essential element of the crime charged. The second is the construction which the court puts upon the 1915 amendment to what is now section 28-538, R. R. S. 1943.

The defendant in this case was the manager of the company's gas station at Wilber. There were at all

times four or five other employees of the company who sold and delivered gasoline and other commodities including bulk deliveries to farm customers. They had access to the commodities sold and made deliveries when the defendant was not present. The defendant's possession of the gasoline of the company and the transaction of its business was not an exclusive possession.

There was a shortage of gasoline. However, every witness for the State, including the auditors, testified that there was no evidence that the company had been deprived of any gasoline or other commodity including a "nickel" by the defendant. There was no evidence of an "appropriation" or "conversion" of the company's gasoline or other property by the defendant. The company's president testified that he did not know of any gasoline that defendant had taken wrongfully and a coemployee testified that he had no idea where the missing gasoline went. The State's case as to this element of the offense rests solely and exclusively upon the shortage of gasoline. The court points out no evidence to the contrary.

The court holds: "Embezzlement is the fraudulent *appropriation or conversion* of another's money or property by a person to whom it has been entrusted or into whose hands it has lawfully come by virtue of his employment *with the felonious intent* to defraud or deprive the owner thereof." (Emphasis supplied.)

Here the court recognizes two elements of the offense—appropriation or conversion with felonious intent.

In Chaplin v. Lee, 18 Neb. 440, 25 N. W. 609, we held: "To constitute embezzlement it is essential that the owner should be deprived of the property alleged to be embezzled by an adverse use or holding."

In McAleer v. State, 46 Neb. 116, 64 N. W. 358, following Chaplin v. Lee, *supra*, we held: "To constitute embezzlement the owner must be deprived of his property by an actual adverse use or holding."

In Nelson v. State, 86 Neb. 856, 126 N. W. 518, following the above decisions, we held: "* * * failure to pay over or account for money received by defendant as agent would not amount to embezzlement, if his principal was not in fact deprived of the property by a felonious, adverse use or holding. Under the information, actual conversion with felonious intent was essential to a conviction."

Changing the word "money" to "gasoline" makes the holding directly applicable here.

Following Chaplin v. Lee, *supra,* we held in State v. Hill, 47 Neb. 456, 66 N. W. 541: "It is essential to the crime of embezzlement that the owner be deprived of the property alleged to have been embezzled, by an adverse use or holding."

In Colley v. Chicago & N. W. Ry. Co., 107 Neb. 864, 187 N. W. 98, a civil action for conversion, we held: "The act alleged to be a conversion must be positive and tortious." This decision was followed in Talich v. Marvel, 115 Neb. 255, 212 N. W. 540. Heretofore we have not deviated from these decisions in prosecutions under section 28-538, R. R. S. 1943.

The court points out no evidence of appropriation or conversion, fraudulent or otherwise. There was none.

The court then holds: "Conversion of the property alleged to have been embezzled to the personal use of the person charged is not an essential element of the crime of embezzlement."

Implicit in this statement is the recognition that conversion is an element of the offense. The distinction seems to be in "the personal use of the person charged." The distinction is a play on words.

Following several of the above decisions in Luther College v. Benson, 126 Neb. 410, 253 N. W. 421, we held: "'Embezzle' and 'convert to his own use' are synonymous terms. 'Conversion to his own use' would be accomplished by any unauthorized act of dominion or

ownership exercised by one person over property of another." The court ignores this definition.

Our decisions are in accord with the rules as stated in the authoritative texts. In 18 Am. Jur., Embezzlement, § 21, p. 581, it is stated: "To constitute the crime of embezzlement there must be a fraudulent conversion or misappropriation of property with felonious intent." In 29 C. J. S., Embezzlement, § 11, p. 682, it is stated: "To constitute a conversion so as to make out a case of embezzlement, the owner must be deprived of his property or money by an adverse using or holding; * * *."

In Underhill's Criminal Evidence (5th Ed.), Embezzlement, § 576, p. 1418, it is stated: "The gravamen of the crime is the fraudulent intent, coupled with execution."

In Buckley v. State, 131 Neb. 752, 269 N. W. 892, we held: "The word 'embezzle' includes within its import the fraudulent appropriation of the funds of another to one's own use."

How then does the court avoid the complete lack of evidence and the affirmative negation of any evidence of conversion or appropriation?

The court goes first to the 1915 amendment to what is now section 28-538, R. R. S. 1943, that being the statute upon which the charge here rests. Throughout, the statute uses the synonymous terms embezzle or convert to his own use.

The 1915 amendment as it now appears provides in part: "The failure, neglect or refusal of such officer, attorney at law, agent, clerk, servant, factor or commission agent, as hereinbefore in this section enumerated to pay, deliver or refund to the proper person, company or copartnership such money, goods or property, entrusted to his or her care or which shall come into his or her possession, upon demand, shall be *prima facie proof of intent to embezzle.*" § 28-538, R. R. S. 1943.

The italics are mine. The quoted provision goes only to the second element of the offense, to wit, "proof of intent to embezzle."

The element of conversion remains and requires proof. We held in Nelson v. State, *supra,* that "actual conversion with a felonious intent" was essential to a conviction. The court here recognizes this requirement for it says: "Under this statute, *when other elements* of the crime of embezzlement *have been established,* it is not necessary to offer other evidence of intent to embezzle where a *proper demand has been made.*" (Emphasis supplied.) I shall return to the "proper demand" presently.

Where is the proof of the "other elements of the crime"? The court recites none and there is none.

To avoid that situation the court goes (without citation) to what is now section 28-543, R. R. S. 1943, an act relating to the embezzlement of public money. That act provides in part: "The refusal of any such officer or person, whether in or out of office, to pay any draft, order or warrant which may be drawn upon him by the proper officer, for any public money in his hands, no matter in what capacity the same may have been received or may be held by him, or any refusal by any person or public officer to pay over to his successor any public moneys or securities promptly, on the legal requirement of any authorized officer of the state or county, shall be taken, on the trial of any indictment against such officer or person for embezzlement, as *prima facie evidence of such embezzlement.*" (Emphasis supplied.)

The difference in the two statutes is patent. In the instance of the statute under which the defendant was charged the Legislature made failure to comply with a proper demand prima facie proof of intent to embezzle. In section 28-543, R. R. S. 1943, the Legislature made a refusal to comply with a proper demand prima facie evidence of embezzlement.

Because in Bolln v. State, 51 Neb. 581, 71 N. W. 444, and Whitney v. State, 53 Neb. 287, 73 N. W. 696, we held the evidence sufficient under section 28-543, R. R.

S. 1943, the court concludes that a prima facie case of *intent to embezzle* is sufficient to take this case to the jury in a prosecution under section 28-538, R. R. S. 1943. The court ignores the fact that the "other elements of the crime" have not been established.

There remains the void of evidence of appropriation or conversion by the defendant.

State v. Boatman, 142 Neb. 589, 7 N. W. 2d 159, 144 A. L. R. 585, was a prosecution under what is now section 28-543, R. R. S. 1943. In that case the court referred to the rule of strict construction applicable to all criminal statutes and held that any change in the act was a matter for legislative action and not judicial interpretation.

So here, if the refusal to comply with a proper demand under section 28-538, R. R. S. 1943, is to be made prima facie evidence of embezzlement and not "intent to embezzle," that is a matter for legislative action and not judicial construction. The Legislature has said in section 28-538, R. R. S. 1943, only that it is prima facie proof of intent to embezzle. It involves only one element of the offense of embezzlement under the statute involved here.

I now go to the demand which the court says was a "proper demand" under the statute and in and of itself made a prima facie case of embezzlement to take the case to the jury.

It was a demand to "refund * * * Approximately 57,000 gallons of gasoline * * * which is at this time missing and not properly accounted for."

It was a demand for the "refund" of at least 1,100 gallons (and under one version of the State's evidence, 11,100 gallons) more gasoline than the State claimed at any time was missing and not accounted for.

Was it a "proper demand"? Obviously the company knew it was demanding a refund of more gasoline than was unaccounted for. Obviously every one knew that the defendant could not refund that gasoline.

If the defendant had agreed to the refund, under the court's construction of the act, he would have been confessing guilt of embezzlement of more than the claimed shortage. If defendant had pointed out the over demand, then under the court's theory he would have been admitting guilt of embezzlement of some amount. By denying the "refund" he, without more, under the court's holding established evidence to go to the jury sufficient to sustain a verdict of guilty. The defendant did not have the chance of a person playing Russian roulette. Here every chamber of the gun was loaded against him.

Were the evidence of intent to embezzle as to these matters fully stated, I think it insufficient to sustain a conviction under the circumstantial evidence rule stated in Larson v. State, 161 Neb. 339, 73 N. W. 2d 388.

But I pass that. Conceding it sufficient to prove intent to embezzle, it does not prove the required element of conversion or appropriation.

In Nelson v. State, *supra,* an embezzlement case, we held: "* * * an unexecuted purpose to embezzle is not embezzlement * * * actual conversion with a felonious intent was essential to a conviction."

In Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539, we said: "A conviction should not be based on the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained."

All that is necessary under this decision to take a case of embezzlement to the jury under section 28-538, R. R. S. 1943, is for the State to submit evidence of a shortage of money or commodities and a "proper demand" to pay, refund, or deliver. Under this decision a manager of a store could be found guilty of embezzlement for shortages in cash from a money till used by other employees; for shrinkage in stored potatoes, if the full measure put in a bin were not accounted for; or flour leaking out

through a rat hole where he could not prove when the leak began or the amount of leakage.

The State could prove a proper demand and without more a case for the jury is made, and without more a conviction must be sustained. I do not agree.

I would reverse the judgment of the trial court and remand the cause with directions to dismiss.

FEDERAL INSURANCE COMPANY, APPELLANT, V. INTERNATIONAL HARVESTER COMPANY, A CORPORATION, APPELLEE.
83 N. W. 2d 382

Filed May 24, 1957. No. 34184.

1. **Automobiles: Bailments.** An owner of a garage with whom a motor vehicle is left by its owner for repairs or to be serviced is a bailee for hire or for mutual benefit and is required to exercise ordinary care for the safekeeping of the vehicle.
2. **Bailments.** A bailee of a chattel for the mutual benefit of the parties to the bailment or for hire, in the absence of an express contract, is liable to the bailor only for any loss resulting from the negligence of the bailee.
3. ———. The petition of a bailor in an action to recover for damage done by fire to the subject of such a bailment while in the custody of the bailee which does not allege that negligence of the bailee was the proximate cause of the damage does not state a cause of action.
4. **Negligence.** A litigant who charges his adversary with negligence has the burden throughout the litigation to establish it.
5. **Pleading.** The failure of a petition to state a cause of action may be challenged at any time during the pendency of the litigation.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Affirmed.*

Robert W. Haney and *Thomas J. Walsh,* for appellant.

Fitzgerald, Hamer, Brown & Leahy, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Lyman-Richey Sand & Gravel Corporation of Omaha was the owner of a 1950 tractor, sometimes referred to in the record as a truck. The owner was indemnified against loss of or damage to it by fire by virtue of a policy of fire insurance issued to it by appellant. The tractor, while in the custody of appellee for the purpose of having a change made in a part of its equipment, was damaged by fire to the extent of $1,992.91. This amount was paid to the owner of the tractor by appellant. It seeks to recover that amount from appellee on the basis of the subrogation of appellant to the rights of its insured.

The substance of the petition is that on May 24, 1950, the tractor was being serviced by employees of appellee acting within the scope of their employment at its place of business; that while the gasoline tank of the tractor was being drained of gasoline the tractor burst into flames and the fire caused damage to the tractor in the amount of $1,992.91; that the tractor and the apparatus used in reference to it were in the control of appellee; and that appellant was obligated by the policy of insurance to pay and it paid the amount of the damage to the insured as evidenced by a subrogation receipt, a copy of which was attached to the petition. The answer of appellee admitted ownership of the tractor, the issuance of the fire insurance policy, and the damage to the tractor by fire while it was in the shop of appellee and while the gasoline tank thereon was being drained of gasoline, as alleged in the petition of appellant. A denial was made of the other statements of the petition.

The appellee, at the first offer of testimony by appellant, objected to the introduction of any proof in the case because the petition did not allege facts sufficient to state a cause of action in favor of appellant and against appellee. The trial court reserved ruling thereon. Appellee, at the close of the evidence of appellant in its

case-in-chief, interposed a motion for an instructed verdict in favor of appellee. The motion challenged the sufficiency of the petition to state a cause of action against appellee. The motion was denied. Appellee made a motion to dismiss the case or, in the alternative, for an instructed verdict, after the evidence was concluded and a specification thereof was that the petition of appellant did not state facts sufficient to constitute a cause of action against appellee and failed to allege any negligence of appellee which was the proximate cause of the fire of May 24, 1950. The court sustained the motion, discharged the jury, and rendered a judgment of dismissal of the case. A motion for new trial was denied. This appeal tests the correctness of the action of the trial court in rendering a judgment of dismissal and refusing a new trial of the cause.

The issue concerning the sufficiency of the petition to state a cause of action against appellee is of primary importance in this case. Appellant asserts that if a bailee accepts delivery of a chattel for the purpose of special service in relation to it for a consideration and agrees to return the subject of the bailment to the bailor in otherwise unaltered condition, upon the completion of the service and payment of the agreed charge therefor, the duty of the former is to return the chattel to the latter in the condition it was when received, except as altered by the service performed on it by the bailee, and the bailment is not conditioned upon the exercise of due care and the observance of due care is not a defense to an action of the bailor against the bailee for damages for breach of the agreement. Appellant says that the case of Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc., 162 Neb. 47, 75 N. W. 2d 366, is a leading case on this subject and is determinative of the instant case. It is said therein: "* * * the defendant contracted to return the plaintiff's car to it in substantially the same condition as when it was received. It was not conditioned on the exercise of due care * * *.

The promise as testified to by both parties was absolute. The exercise of ordinary care is not a defense under these conditions. The law does not warrant it." The facts in that case and the facts pleaded in this case have no similarity and what is said in Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc., *supra*, is unimportant in the cause now being considered because appellant has not pleaded an express or a special contract of bailment of the machine concerned in this case. The petition states only that Lyman-Richey Sand & Gravel Corporation of Omaha was the owner of the International truck, that it was being serviced by appellee acting by its employees in its place of business, and that while the gas tank was being drained under the exclusive control and management of the employees the truck burst in flames and was damaged. Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc., *supra*, is not only not decisive of this case but it has no application to and can have no effect in the decision of it.

The most that the petition says is that the owner of the tractor placed it in the custody of appellee to be serviced, that appellee accepted the assignment and was performing it when the fire occurred, and that the tractor was thereby damaged. It was a bailment for hire sometimes referred to as a reciprocal bailment. Although no direct hire was pleaded for the bailment, it was a necessary incident of the business conducted for profit. Nagaki v. Stockfleth, 141 Neb. 676, 4 N. W. 2d 766; Shiman Bros. & Co., Inc. v. Nebraska Nat. Hotel Co., 146 Neb. 47, 18 N. W. 2d 551. In the instance of such a bailment, ordinary care is required of the bailee and he is liable for his negligence in case of loss or damage of the subject of the bailment.

It is stated in Mattern v. McCarthy, 73 Neb. 228, 102 N. W. 468: "When a bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for negligence." The opinion in that case contains this:

"The contract was for the benefit of both parties. The bailor delivered the possession of his cattle to the bailee with the intention upon the part of both of the parties to the contract that the result of the agistment would be mutually advantageous. * * * The general rule of law is that, where a bailment is mutually advantageous to both parties, the bailee is required to exercise only ordinary and reasonable care and diligence. He must exercise such care as a man of ordinary prudence would use under the same circumstances toward his own property."

The statement first quoted above is repeated in Nagaki v. Stockfleth, *supra,* and it is further said therein: "The following is a pertinent general rule: 'A repairman with whom a motor vehicle is left for repairs is, under the rules applicable generally to bailees for mutual benefit or bailees for hire, required to exercise ordinary care for its safe-keeping, and is liable to the owner for any loss resulting from his negligent acts or omissions, or those of his agents or employees while acting within the scope of their employment.' 42 C. J. 814. This is in harmony with the Nebraska rule * * *."

In Shiman Bros. & Co., Inc. v. Nebraska Nat. Hotel Co., *supra,* the appellant, plaintiff in the trial court, contended that the rule in this state places the burden on a bailee for hire to show that property entrusted to his care was lost without negligence on his part. The appellant requested an instruction which placed the burden on the appellee, defendant in the district court, to establish that the trunk and contents were not lost by reason of the negligence of appellee. It was not given and its refusal was claimed to be error. This court said the case was predicated on negligence of the appellee and that: "In this state when a party alleges and charges negligence, the burden of proving negligence on the part of the defendant rests upon the plaintiff and never shifts to the defendant in any stage of the case. * * * The court's instructions properly placed the

burden of proof * * *." See, also, Fuelberth v. Splittgerber, 150 Neb. 309, 34 N. W. 2d 380; Armstrong v. State Farm Mutual Automobile Ins. Co., 153 Neb. 144, 43 N. W. 2d 501; Blackburn v. Norris, 46 Ohio App. 469, 189 N. E. 262; Clark v. United States, 95 U. S. 539, 24 L. Ed. 518; 6 Am. Jur., Bailments, § 242, p. 345; 8 C. J. S., Bailments, § 27, p. 269; Annotation, 15 A. L. R. 681.

Appellant does not in its petition plead a case of nonreturn of the property, the subject of the bailment, or damage thereto in an unknown manner but appellant goes further and alleges the property was damaged in a definite manner, that is, by a fire, which alone does not give rise to any presumption of negligence of the bailee. Security Ins. Co. v. Coca-Cola Bottling Co., 157 Neb. 923, 62 N. W. 2d 127. In such a situation the litigant claiming a right of recovery from a bailee must allege negligence on his part as the proximate cause of the damage. The petition does not allege that negligence of appellee was the proximate cause of the fire or of the damage to the tractor. It does not state a cause of action against appellee and the court properly dismissed the case. The failure of a petition to state a cause of action may be challenged at any time during the pendency of the litigation. § 25-808, R. R. S. 1943; Martindale v. Panter, 137 Neb. 522, 289 N. W. 869; Stitzel v. Hitchcock County, 139 Neb. 700, 298 N. W. 555.

The judgment should be and it is affirmed.

AFFIRMED.

CHARLES TERRENCE EGENBERGER, A MINOR, BY AND THROUGH HIS FATHER AND NEXT FRIEND, CHARLES EGENBERGER, APPELLEE, V. NATIONAL ALFALFA DEHYDRATING AND MILLING COMPANY, A CORPORATION, ET AL., APPELLANTS.

83 N. W. 2d 523

Filed May 31, 1957. No. 34102.

1. **Trial.** A motion for directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence.** In an action for damages for negligence the burden is on the plaintiff to show by direct or circumstantial evidence that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it.
3. ———. Proof of negligence is sufficient if the facts and circumstances proved, together with the reasonable inferences which may be drawn therefrom, shall indicate with reasonable certainty the negligent act of which complaint is made.
4. **Negligence: Pleading.** In the absence of an issue of negligence by plaintiff or by a third person imputable to plaintiff, allegations in an answer denying that defendant was negligent and alleging that the accident and resulting damages were solely and proximately caused by the negligence of such third person is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto, but rather is one entirely consistent with and provable under the general issue.
5. **Torts.** Where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tortfeasor may be held for the entire damage—not because he is responsible for the act of the other, but because his own act is regarded in law as a cause of the injury.
6. **Negligence: Highways.** The violation of a statute, the purpose and design of which is to protect the safety of people in the use of the public highways, is not negligence per se, but is evidence of negligence, which may be considered by the jury together with all other facts and circumstances in determining whether or not negligence is established thereby.

7. **Automobiles: Trial.** In order for physical facts to be sufficient to warrant a directed verdict in an automobile collision case, they must conclusively demonstrate that the collision out of which the injuries arose was not caused by any negligence on the part of the party making the motion. Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury.
8. **Negligence.** A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonable in the nature of things to be contemplated or foreseen by him, and produces the injury, it is the dominant cause.
9. ———. If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence.
10. **Negligence: Appeal and Error.** In a jury case involving issues of negligence and proximate cause, where different minds may reasonably draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, such issues must be submitted to the jury for its determination, and its verdict based thereon will not be disturbed unless clearly wrong.
11. **Automobiles: Evidence.** Generally, testimony as to tire marks on the highway is admissible in civil actions for injury or damage, where a sufficient foundation therefor is laid, as by showing, for example, that the condition of the road was the same as it was at the time of the accident and had not been changed by the weather or traffic, and there is sufficient identification that the marks were made by the automobile involved in the accident.
12. **Negligence.** Although evidence of use of intoxicating liquor at or about the time of an accident may be insufficient to prove intoxication, yet if the occurrence is so close in time to an accident as to be considered an incident related thereto, it may be admitted as a circumstance proper to be considered by a jury in determining the existence or nonexistence of negligence.
13. **Trial.** While it is not the duty of the reporter to take down the arguments to the jury unless he is directed to do so, he should be available, and if objections are made or controversy arises during the course of the argument, the court, whose duty it is to be present at all stages of the trial, should direct a record to be made thereof.

14. ———. Generally, a trial court may in its discretion permit counsel, in addressing the jury, to display and use schematic drawings, diagrams, or maps, not put in evidence, by way of illustration or elucidation of evidence actually adduced, provided the jury understands that they are employed merely for such purposes and are not of themselves evidence in any sense.
15. **Negligence: Trial.** It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and evidence, and such rule applies in cases wherein defendant pleads and adduces evidence that plaintiff's driver was negligent in certain specified particulars and that such negligence was the sole proximate cause of the accident and injuries.
16. **Trial.** The purpose of an instruction is to furnish guidance to the jury in its deliberations, and to aid it in arriving at a proper verdict; and, with this end in view, it should state clearly and concisely the issues of fact and the principles of law which are necessary to enable it to accomplish the purpose desired.

APPEAL from the district court for Dawson County: JOHN H. KUNS, JUDGE. *Reversed and remanded.*

Maupin, Dent, Kay & Satterfield and *William E. Morrow, Jr.*, for appellants.

Smith Brothers, Beatty, Clark, Murphy & Morgan, Donald W. Pederson, and *Frank E. Piccolo, Jr.*, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiff, Charles Terrence Egenberger, a minor, brought this action by his father and next friend, against defendants, National Alfalfa Dehydrating and Milling Company, a corporation, and Leon A. Turner, employed by the corporation as a truck driver, seeking to recover damages for personal injuries alleged to have been proximately caused by negligence of defendants while the truck driver was operating the corporation's power wagon and attached alfalfa trailer in the regular course of his employment.

Plaintiff's petition alleged in substance that on August

29, 1954, at about 11:40 p. m., while he was a passenger in the left rear seat of a 1947 Pontiac sedan driven by another in an easterly direction on the right side of a graveled county road, defendant truck driver, while operating defendant corporation's red 1947 Dodge power wagon pulling a dark green four-wheel trailer loaded with chopped green alfalfa, negligently collided with the car in which plaintiff was riding, which proximately caused plaintiff to suffer painful permanent personal injuries, damages, and disability, requiring repeated hospitalization and extensive surgical and medical treatment. The alleged negligence of defendants, as important here, was as follows: (1) That defendant driver negligently failed to give the car in which plaintiff was riding one-half of the main-traveled portion of the roadway, as nearly as possible; (2) that he negligently operated defendant's trailer at night without displaying a clearance light at the left front edge of the trailer; and (3) that he negligently failed to exercise reasonable control over the operation of the power wagon and trailer.

The joint answer of defendants admitted the occurrence of a collision at about the time and place alleged between the car in which plaintiff was riding and the vehicles owned by defendant corporation, then operated by its driver while in the regular course of his employment. Such answer then denied generally and alleged that the sole proximate cause of the collision and any resulting injuries and damages suffered by plaintiff was the contributory negligence of plaintiff and the negligence of plaintiff's driver. In that connection, the evidence failed to establish that plaintiff was guilty of any contributory negligence, and no complaint is here made that such issue was not submitted to the jury. The alleged negligence of plaintiff's driver as important here was: (1) That he failed to keep a proper lookout, and (2) failed to have his car under reasonable control while driving on the wrong side of the road

around a curve at an excessive rate of speed after theretofore engaging in the consumption of intoxicating liquor. Plaintiff's reply was a general denial.

The cause was tried to a jury and defendants' motions to direct a verdict or dismiss, made at conclusion of plaintiff's evidence, and at conclusion of all the evidence, upon the ground that there was insufficient competent evidence adduced to support a verdict in favor of plaintiff and against defendants, were overruled. Thereafter, upon submission of the cause to the jury, it returned a verdict for plaintiff and against defendants, and fixed the amount of plaintiff's recovery at $40,000. Subsequently, defendants' motion for judgment notwithstanding the verdict, or in the alternative for new trial, was overruled, and judgment was rendered upon the verdict. Therefrom defendants appealed to this court, assigning in substance that the trial court erred as follows: (1) In failing to sustain their motion for directed verdict or dismissal and in failing to sustain their motion for judgment notwithstanding the verdict or for new trial; (2) in excluding certain evidence and in permitting plaintiff's counsel during final arguments to use and display to the jury exhibit No. 29 theretofore excluded from evidence; (3) in refusing and failing to give and in giving certain instructions; (4) in denying defendants' request to have all of plaintiff's final arguments officially reported; and (5) in failing to set aside the verdict as clearly exorbitant. We sustain assignment No. 3 in part, reverse the judgment, and remand the cause for new trial, which requires no determination of assignment No. 5. A disposition of the other assignments requires an examination of the record and the application of certain statutes and established rules of law thereto.

"A motion for directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion

is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." Colvin v. Powell & Co., Inc., 163 Neb. 112, 77 N. W. 2d 900.

"In an action for damages for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it.

"Negligence is a question of fact and may be proved by direct or circumstantial evidence.

"Proof of negligence is sufficient if the facts and circumstances proved, together with the reasonable inferences which may be drawn therefrom, shall indicate with reasonable certainty the negligent acts of which complaint is made." Hansen v. Henshaw, 163 Neb. 191, 79 N. W. 2d 15. See, also, Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112; Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701.

"In the absence of an issue of negligence by plaintiff or by a third person imputable to plaintiff, allegations in an answer denying that defendant was negligent and alleging that the accident and resulting damages were solely and proximately caused by the negligence of such third person is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto, but rather is one entirely consistent with and provable under the general issue." Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333.

"Where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tortfeasor may be held for the entire damage—not because he is responsible for the act of the other, but because his own act is regarded in law as a cause of the injury." Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569. See, also, Bergendahl v. Rabeler, 133 Neb. 699,

276 N. W. 673, wherein we held: "When separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages, though one of them alone might not have caused the injury.

"Where the negligence of the driver of an automobile in which plaintiff is riding as a passenger is the sole proximate cause of a collision in which plaintiff is injured, plaintiff cannot recover from a third person for such injury." See, also, Burhoop v. Brackhan, *ante* p. 382, 82 N. W. 2d 557.

"As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision.

"The basis of this rule is that a driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and that he cannot relieve himself of that duty. And, in conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it.

"Exceptions have been recognized to this general rule where the object or obstruction or depression is the same color as the roadway and for that reason, or for other sufficient reasons, cannot be observed by the exercise of ordinary care in time to avoid a collision." Guerin v. Forburger, 161 Neb. 824, 74 N. W. 2d 870.

"The violation of a statute the design of which is to protect the safety of people in the use of public highways is evidence of negligence." Segebart v. Gregory, 156 Neb. 261, 55 N. W. 2d 678.

"The violation of statutes regulating the use and operation of motor vehicles upon the highway is not negligence per se, but evidence of negligence, which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby, and where the evidence is such

that reasonable minds may draw different conclusions therefrom, the questions of negligence * * * are for the jury." Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612.

In Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683, we held that: "A traveler on a highway is required to exercise reasonable care for the safety of others thereon.

"What is reasonable care does not permit of definitive statement applicable to all cases but the presence or absence of reasonable care must be determined by the facts and circumstances of each case.

"If there is evidence adequate to justify a finding for the party who has the burden of proof, in an action triable to a jury, the trial court may not disregard the proof and decide the case as a matter of law."

Further, "The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing.

"The violation of an ordinance or statute requiring automobiles and other vehicles to drive to the right of the center of the highway does not constitute negligence per se, or as a matter of law; but whether or not such violation constituted negligence is a question for the jury under proper instructions." Davis v. Dennert, *supra.*

"In order for physical facts to be sufficient to warrant a directed verdict in an automobile collision case, they must conclusively demonstrate that the collision out of which the injuries arose was not caused by any negligence on the part of the party making the motion.

"Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury." Young v. Stoetzel, 159 Neb. 624, 68 N. W. 2d 186.

Contrary to defendants' contention, there is a reasonable dispute as to what the physical facts show and

they do not conclusively demonstrate that the collision out of which plaintiff's injuries arose was not caused by any negligence of defendants.

"Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the accident could not have happened.

"A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonable in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the dominant cause.

"If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence." Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831. See, also, Colvin v. Powell & Co., Inc., *supra*.

"Although the question of proximate cause is ordinarily for the determination of the jury, where, upon the evidence produced, only one inference can be drawn, it is for the court to declare whether a given act or series of acts is the proximate cause of the injury." Bergendahl v. Rabeler, *supra*.

However, in a jury case involving issues of negligence and proximate cause, where different minds may reasonably draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, such issues must be submitted to the jury for its determination, and its verdict based thereon will not be disturbed unless clearly wrong. Colvin v. Powell

& Co., Inc., *supra;* Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293.

The following statutes are pertinent and applicable in the case at bar. Section 39-746, R. R. S. 1943, provides: "Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway and shall drive a slow moving vehicle as closely as possible to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway and except when overtaking and passing another vehicle, subject to the limitations applicable in overtaking and passing set forth in section 39-748."

Section 39-748, R. R. S. 1943, provides: "Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one half of the main traveled portion of the roadway as nearly as possible."

In Krepcik v. Interstate Transit Lines, 154 Neb. 671, 48 N. W. 2d 839, we concluded that such sections are to be construed together, and that the "right half of the highway" as that term is used in section 39-746, R. R. S. 1943, means the right half of the main-traveled portion of the highway available for traffic.

Also, in Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593, citing Klaus v. Soloman Valley Stage Lines Co., 130 Neb. 325, 264 N. W. 747, and Kuska v. Nichols Construction Co., 154 Neb. 580, 48 N. W. 2d 682, we held: "A traveler may ordinarily occupy and use any part of a public highway he desires if it is not needed by another whose right thereto is superior to that of the traveler."

Section 39-7,108, R. R. S. 1943, provides in part: "(1) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. * * * (3) The following speeds shall be prima facie lawful, but in any case when such speed would be unsafe, they shall not be lawful: * * * sixty miles per hour between the hours of sunrise and

sunset and fifty miles per hour between the hours of sunset and sunrise upon any highway outside of a city or village. (4) The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed * * * when approaching and going around curves, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazards exist with respect to * * * other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any * * * vehicle or other conveyance on * * * the highway in compliance with legal requirements and the duty of all persons to use due care; * * *."

Section 39-735, R. S. Supp., 1953, provides in part: "Every vehicle, * * * (1) having a width, including load, of eighty inches or more, or (2) having any part thereof or having any load thereupon which shall extend forty inches or more to the left of the center of the chassis shall display, when driven, pulled, operated, or propelled upon any state highway, during the period from one half hour after sunset until one half hour before sunrise, and at all other times when there is not sufficient light to render such vehicle clearly discernible, *two clearance lights* on the left side of such vehicle. One of such lights shall be located at the front and display a green or amber light visible, under normal atmospheric conditions, *from a distance of three hundred feet to the front of such vehicle.* The other clearance light shall be located at the rear and display a red light visible under normal atmospheric conditions, from a distance of three hundred feet to the rear of said vehicle. The light at the rear shall be located at a sufficient distance above the tail light of such vehicle so it will not be confused with such tail light by those approaching from the rear. *Such light* shall be located on a line with the extreme outer point of such vehicle or the load thereon; Provided, *suitable reflectors* of like color, equal visibility, and of a

type approved by the Department of Roads and Irrigation may be substituted for *such clearance lights;* and provided further, *the installation of all lamps shall be made in such a manner that no hazard will be created by their use on the highway.*" (Italics supplied.)

With regard to such section, a part of defendants' tendered instruction No. 2 requested the trial court to inform the jury with regard to defendants' trailer that: "At the time of the collision involved in this case the statute did not specifically provide where the front light should be located upon the vehicle other than upon the left side thereof." The trial court refused to do so, and by instructions Nos. 5, 6, and 9 informed the jury substantially that the left front clearance light of defendants' trailer was required by law to be located and displayed on a line with the extreme outer left front edge or point of such vehicle. In that connection, defendants argued that the refusal to inform the jury as requested, and the information with relation thereto contained in instructions Nos. 5, 6, and 9, was a judicial extension of the language of section 39-735, R. S. Supp., 1953, and prejudicially erroneous. We do not agree.

A history of the statute and its related language, when considered in context, refutes defendants' contention. The solution depends upon whether the italicized portion aforesaid, to wit, "Such light," refers to both clearance lights or only the one at the rear. We conclude that it refers to both.

The history of that section discloses that as originally enacted by Laws 1931, chapter 106, section 2, page 280, the section read "Said lights." When amended by Laws 1939, chapter 78, section 3, page 319, it read "Said lights." Thereafter, it appeared in section 39-735, R. S. 1943, as "Such lights." When amended by Laws 1945, chapter 92, section 1, page 314, it read "Such lights." When amended by Laws 1949, chapter 117, section 1, page 313, it read "Such lights." However, when that act was carried over as section 39-735, R. R. S. 1943, by the reissue

of volume 3 of the statutes in 1952, there was simply an inadvertent typographical omission of the letter "s" from the words "Such lights," which erroneously made the section read "Such light." Thereafter, when amended by Laws 1953, chapter 131, section 13, page 409, in order only to make the section applicable to any such vehicle operating "upon any state highway" instead of "upon any paved or bituminous surfaced highway," the aforesaid typographical omission was inadvertently carried forward as "Such light" instead of "Such lights," into section 39-735, R. S. Supp., 1953. From such history and language, we find no clear legislative intent to change the basic law and make it an absurdity by permitting a clearance light to be located in such manner that it could not reasonably be seen from a distance of 300 feet from the front of such vehicle in order to clear, but would create a hazard on the highway, contrary to the very language, purpose, and design of section 39-735, R. S. Supp., 1953.

As hereinafter observed, it is undisputed that defendants violated section 39-735, R. S. Supp., 1953, in failing to locate the left front clearance light of their trailer "on a line with the extreme outer point of such vehicle or the load thereon," so that it would be "visible, under normal atmospheric conditions, from a distance of three hundred feet to the front of such vehicle," which was evidence of negligence that might be taken into consideration with all other facts and circumstances by the jury in determining whether or not defendants were negligent, and if so, whether or not such negligence proximately caused or contributed to the accident and plaintiff's injuries.

The record discloses evidence adduced in plaintiff's behalf substantially as follows: On the early evening of August 29, 1954, four young men and two young women, all of whom were minors, drove to Gothenburg in a 1947 Pontiac hard-top four-door sedan, owned and driven by one of the young men named Joe Tetro, who was a

friend of the group. There they all went to a picture show which ended about 11:15 p. m. They then drove out to a parkway just west of Lake Helen near Gothenburg and parked the car, facing north. One of the young men had a one-half pint bottle of bourbon whiskey and six bottles of Seven-Up. Someone in the group then spiked each of the six bottles of Seven-Up alike with one ounce plus of bourbon, and discarded the whiskey bottle. None of them had any other drinks of intoxicating liquor during that day or the evening hours while they were together. While there, each of the young people consumed one such drink while they casually visited with each other for 15 or 20, maybe 30 minutes. By that time a rain storm with gusty wind and lightning was approaching, so they decided to go home. They started to do so with Joe Tetro at the wheel. All other occupants, including plaintiff, were simply guests in the car. Kathleen McCullough sat next to the driver in the middle of the front seat, with John William Egenberger, plaintiff's brother, sitting on her right. Plaintiff sat in the left rear seat, with Betty Hoagland, a friend of Kathleen's in the middle, and with Bill McCullough on her right. Kathleen and Bill were brother and sister, and cousins of plaintiff and John William Egenberger. Four occupants of the car who saw and recalled the facts and circumstances surrounding the accident, and plaintiff, who, because of his injuries, had no memory or recollection with regard thereto, testified as witnesses for plaintiff.

From the parkway, plaintiff's driver drove north about one-fourth mile on the right side of a rather hard, dry, graveled road, which then turned east at a 66-degree curve and slightly inclined upward for about a block to a crest, then leveled off some distance and turned northeast around a 23-degree curve to a main-traveled highway. All four witnesses testified that none of the occupants, including plaintiff's driver, was affected in any manner by the one and only drink of intoxicating

liquor. Plaintiff's driver had driven with care and none of them had any worry or anxiety about the manner in which the car was driven. No one testified that any of the occupants were under the influence of intoxicating liquor or had any odor thereof upon them after the accident.

The accident occurred on the graveled road near a point about 148 feet east of the 66-degree curve. At the place where the collision occurred, the graveled portion of the road was 28½ feet wide, with a ditch 3 feet wide south of the graveled portion. North of the main-graveled portion was an additional solid north shoulder 3½ feet wide, having a slope of only 6 or 7 inches to a north bank over which defendants' driver could reasonably have operated his vehicles. In other words, it was 32 feet from the north bank to the south edge of the graveled portion of the road. Also, at the point of collision there was a driveway level with the road leading north into the west gate of the so-called rodeo grounds on the north side of the road upon which the driver of defendants' vehicles, traveling west, could have safely turned out if not driving at a high rate of speed.

Defendant Turner was driving defendant corporation's dark red power wagon west. It had a four-wheel, dark green trailer, with a box thereon, containing about 3 tons of chopped green alfalfa, attached to the rear of the power wagon by a 4 foot 1 inch tongue. The power wagon concededly weighed 6,000 pounds. The trailer itself concededly weighed 5,600 pounds, and as so loaded it weighed 11,600 pounds. Thus the total weight of the power wagon and loaded trailer was 17,600 pounds. The power wagon, equipped only with ordinary foot and emergency brakes, was 6½ feet wide and 16½ feet long, with headlights 43 inches above the ground and 48 inches apart from center to center, which would make the level of the driver's eyes when seated in the cab about 5½ feet above ground. The cab had no border or side lights. The trailer had no brakes. Its box was

14 feet long, which would make the power wagon and attached trailer some 34½ feet long. The trailer box was 8 feet 4½ inches wide, and protruded out over the left or south side of the road 4½ inches farther than it did on the right or north side. The bottom of the trailer box was 45 inches above the ground. An amber clearance light on the left side or front of the trailer was located 47 inches above the ground and 12 inches to the right of the extreme left lower outer corner of the box where a steel lever-operated gate was located to the left of it with which to dump the alfalfa. A witness for defendants testified that such front clearance light was located 7 inches to the right of the left lower outer corner of the trailer, but the jury could have found from his testimony that such measurement had been made after the trailer had been repaired by the removal of about 4 inches of the over-protruding left side of the trailer box. In any event, such clearance light was not located "on a line with the extreme outer point of such vehicle or the load thereon" as required by section 39-735, R. S. Supp., 1953, heretofore discussed. The jury had a right to believe that such clearance light was located 12 inches to the right of the lower left corner of the trailer which would place it just 4 inches higher and behind the left headlight on the power wagon, and leave 12 inches or more of the over-protruding left corner of the trailer box without any clearance light. Thus the jury could have reasonably concluded that such clearance light was not discernible to plaintiff's driver and the occupants of his car, approaching from the west.

As the car in which plaintiff was riding turned east at the 66-degree curve on its right side of the road traveling 20 or 25 miles an hour without any skidding or weaving, four of the passengers who were then looking, saw defendants' power wagon headlights approaching from the east at the top of the crest about a block away. The wind was blowing gustily and there was

some dust, but their observations were not obstructed thereby. Contrary to defendants' contention, such observations about which they testified were affirmative and not negative evidence.

Although they were looking, none of them ever saw any clearance light on the left front side of the trailer and all were entirely unaware that it was on the road. One such occupant was unfamiliar with the road and, although looking, could not tell whether or not the headlights of defendants' power wagon were approaching in the middle of the road, or estimate defendants' speed, although they did not seem to be approaching exceedingly fast. Another who was looking observed that the approaching headlights "were in the center" of the road "over their line." Another who was looking observed that defendants' approaching headlights were "a little on our side" of the road and approaching at "about the same speed" as the car. The latter statement is corroborated by the fact that the collision occurred about 148 feet, or one-half of the block, between the crest and the curve. Another observed that the approaching headlights "looked like they was over toward the center" of the road and approaching at about the same speed as the car, although plaintiff's driver accelerated his speed some, up to maybe 40 miles an hour, after turning the curve. Four occupants of the car observed that plaintiff's driver was driving with care over on his own side of the road at all times and they had no anxiety or anticipation that a collision would occur.

The car passed the power wagon without incident, but suddenly without warning the lower left-hand protruding corner of the trailer collided with the car at the upper left-hand corner of its cowl, just ahead of the left windshield post. The collision tore off the left windshield post and glass, without touching the steering wheel. It tore off the left front door post, permitting that door to sag down and outward toward the ground on the left side of the car. It tore off its left back door,

which was later found in the road some distance east of the trailer. It tore the top of the car entirely loose from its moorings and laid it back on the trunk. The impact threw John William Egenberger, who sat on the right side of the front seat, out of the car into the south edge of the road, where, unconscious, he remained for some time until some one came to his assistance. The impact knocked plaintiff's driver unconscious, and, with the power still on, he slumped down in his seat with his hands off the steering wheel and his foot down on the accelerator while the car went down the road toward the east. Thereupon Bill McCullough, the young man sitting in the right rear seat, reached over the front seat, grabbed the steering wheel, and told his sister Kathleen to turn off the ignition. However, bleeding from lacerations around her eyes, she could not see to do so. In that situation, Bill steered the car along the road toward the east until he intentionally turned it off the road and crashed into the east rodeo gate about 594 feet from the place of collision, where it stopped with its rear about 12 feet north of the road. There the car struck the west gate post and all remaining occupants except plaintiff were thrown out to the ground. Plaintiff was thrown to the floor with his head hanging out over the running board. He was unconscious and gravely injured about his left shoulder, head, and face, which resulted in permanent disfiguration of the left side of his face. The other occupants were also injured in varying degrees unimportant here.

A state patrol sergeant, who testified as a witness for plaintiff, arrived at the scene of the accident about midnight, accompanied by a state patrol trooper. The Gothenburg chief of police and defendant driver were there at that time and defendant corporation's manager arrived some time later. It began to rain lightly at about the time the sergeant and trooper arrived, and they sat in their car a few moments until a more severe shower abated. The sergeant then investigated the sit-

uation, made measurements, and prepared a diagram to illustrate his findings. It appears in the evidence as exhibit No. 18. He examined the car and orally described damages thereto substantially as heretofore recited. He examined the trailer and found that the wood and metal gate latch at the bottom of the left front corner of the box thereof had been damaged. He found no other damages to the trailer. The graveled portion of the road was 28½ feet wide and fairly smooth, with no marked center line. It was 32 feet from the north edge of the 3-foot south ditch across the graveled portion of the road and the north solid shoulder thereof to the north bank. There was no gravel piled along either side of the graveled portion of the road. There were no visible tracks indicating the course of the vehicles prior to the collision. He found a gouge mark or marks about 10 inches long and 4 inches wide extending east and west under a Pontiac car door, which had been picked up by someone east of that point and so placed to prevent obliteration of the gouge by the rain. It was 13 feet 6 inches from the north edge of the gouge to the north edge of the graveled portion of the road. The county surveyor, as a witness for plaintiff, indicated that such distance should have been 14 feet, but his measurements were made sometime later. The north edge of the gouge was 17 feet south of the north bank of the road. The south edge of the gouge was located 14 feet 8 inches north of the south edge of the graveled portion of the road. Thus, by respectively measuring from the north and south edges of the gouge, a differential of 4 inches in the width of the graveled portion was accounted for. It was 23 feet 8 inches from the west post of the west rodeo gate and across its driveway directly south to the north edge of the gouge. It was 15 feet diagonally northwest from the gouge to the left rear corner of defendants' trailer box, which had stopped with the right rear corner of the box 4 feet 6 inches south of the north bank and about

1 foot from the north edge of the graveled portion of the road. The sergeant testified that the gouge could have been made by the left end of the Pontiac's front bumper which extended out several inches to the left of the car as it went under the left front corner of the trailer and was pushed down to the ground, or that it could have been so made by the car door when it was torn loose and swung out to the left or north away from the car and went down into the road. All parties have generally assumed the latter to be true.

The record discloses evidence adduced in defendants' behalf substantially as follows: Defendant truck driver testified that he was driving the power wagon in low gear at about 5 miles an hour on the right side of the graveled portion of the road, but not out on the shoulder because he didn't feel it was safe there. His headlights and clearance lights were on as he came over the crest and started down grade to what he called the blind intersection. He was familiar with the road, having traveled over it many times recently with that or other similar vehicles. He first saw the headlights of the car after it crossed a canal bridge about 300 feet south of the curve, which would then be about 600 feet from him. The car was approaching the curve at about 60 miles an hour or more, but slowed down to about 40 miles as the car made the turn. There it plowed up quite a little dust as the car went over the left center of the road in front of him and he thought they would meet head-on. However, the car then straightened up and missed his power wagon but collided with the left front corner of the trailer. He felt the impact but drove on a little way further until he heard the tin car door strike the ground, after which he put on his brakes and stopped within about the length of his vehicles. The collision mashed the left front clearance light and bent the dump gate latch to the left of it. When the collision occurred, the rear of his truck was about 7 feet east of the west post of the west rodeo gate where the drive-

way thereto was level but not long enough he thought to put his whole vehicle upon it. He testified that he drove only 16 feet after he first saw the car 300 feet south of the curve until the collision occurred about 154 feet east of the curve, and that he drove only 2 or 3 feet after the car came around the curve until the collision occurred about 3 seconds later. He testified that he had no time to apply his brakes or give a signal or move over after the car came around the curve, but admitted that after the first time he saw the car speeding 300 feet south of the curve he at all times just kept in the same lane of travel and proceeded down the declining road toward the blind intersection in the same manner as he did before he first saw the car.

One witness for defendants saw the power wagon and trailer stopped on the north side of the graveled portion of the road and could not tell how far the trailer was from the north edge thereof, but claimed that he saw tracks which indicated that it had traveled along in a straight line. Neither the patrol sergeant nor anyone else was able to find any such tracks.

In that connection, although several cars had traveled along the road after the accident, defendant corporation's manager attempted to testify that he saw the tracks of some car which had been skidding around the curve on the wrong side of the road. However, he did not in any manner attempt to trace or connect such tracks to the Pontiac. As a matter of fact, when such evidence was stricken as a conclusion and without foundation, counsel for defendants admitted that he was unable to prove by any evidence that such tracks were made by that car or any other particular vehicle. Nevertheless, defendants argued that the trial court erred in excluding such evidence. We hold otherwise.

In the annotation to 23 A. L. R. 2d at page 116, it is said, citing among other authorities Koutsky v. Grabowski, 150 Neb. 508, 34 N. W. 2d 893, Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436, and Danner v. Walters,

154 Neb. 506, 48 N. W. 2d 635: "The general rule is that testimony as to tire marks on the highway is admissible in civil actions for injury or damage, where a sufficient foundation therefor is laid as by showing, for example, that the condition of the road was the same as it was at the time of the accident, and had not been changed by the weather or traffic, and there is sufficient identification that the marks were made by the automobile involved in the accident." Defendants' contention is controlled thereby.

In the light of the evidence heretofore recited and the authorities heretofore set forth, we conclude that the issues of negligence and proximate cause were for determination by the jury and the trial court did not err in overruling defendants' motions to direct or dismiss, or in refusing to sustain their motion for judgment notwithstanding the verdict.

In Callahan v Prewitt, on rehearing, 143 Neb. 793, 13 N. W. 2d 660, we held: "While evidence of use of intoxicating liquor at or about the time of an accident may be insufficient to prove intoxication yet if the occurrence is so close in time to an accident as to be considered as an incident related thereto it may be admitted as a circumstance proper to be considered by a jury in determining the existence or nonexistence of negligence." See, also, Cunning v. Knott, 157 Neb. 170, 59 N. W. 2d 180.

Concededly, each of the six youthful occupants of the car had consumed one spiked drink containing one ounce plus of bourbon whiskey a few moments before the collision. Four of them testified as witnesses for the plaintiff that they were not affected in any manner by such liquor. As heretofore recited, they also testified concerning their observations and opinions with regard to the distance, speed, relative location of their own and defendants' vehicles, and other matters relating to the collision. Two of such witnesses were asked on cross-examination whether they had been in the habit of

drinking whiskey upon other occasions prior to that night, purportedly in order to establish that they were neophyte drinkers. Objection thereto was sustained, and the trial court limited such inquiry to the consumption of liquor by the witnesses during the day on which the collision occurred. In that connection, defendants argued that the trial court erred prejudicially in so doing. We conclude otherwise.

In 58 Am. Jur., Witnesses, § 624, p. 345, it is said, citing authorities from this and other jurisdictions: "While the principle that cross-examination should be confined to matters relevant and material to the issues is not disputed, the rule of relevancy is much more liberally construed on cross-examination than on direct examination. The exact extent to which cross-examination respecting collateral matters may go rests almost entirely in the discretion of the trial court, since from the nature of the case no fixed rule can be devised defining the right and limiting the extent of irrelevant inquiry which will be just or safe in universal application. This must be determined by the relation and apparent character and bearing of the witness under examination, and the circumstances attending the particular case on trial, and an appellate court will not interfere with the exercise of discretion by the trial court unless a clear abuse thereof appears."

Also, as stated in 58 Am. Jur., Witnesses, § 704, p. 381: "As affecting the credibility of a witness, it may be shown that he was intoxicated at the time of the occurrence of the events about which he testified. This may be done not only by the evidence of another witness, but also by cross-examination of the witness himself, and it has been held unnecessary to lay a foundation for the introduction of proof of this character by first questioning the witness as to his condition at that time.

"Generally speaking, however, the right to impeach a witness by showing intoxication at the time of an occurrence to which his testimony relates extends no

further than the admission of material evidence relevant to the witness's condition during the period covered by such occurrence." See, also, 58 Am. Jur., Witnesses, § 117, p. 91; 61 C. J. S., Motor Vehicles, § 516, p. 250. We conclude that under the circumstances presented in this case, the trial court did not abuse its discretion.

Defendants also argued that the trial court erred prejudicially in refusing to permit their physician, as an expert witness, to answer certain questions with relation to the length of time necessary for alcohol to affect the senses and judgment of a neophyte drinker, and in striking his answer that a neophyte drinker would have quicker reaction from alcohol than one with a tolerance therefor. That contention has no merit because defendants' physician was permitted, without objection, to affirmatively testify fully and at length about such matters. That conclusion also disposes of defendants' contention that the trial court erred in refusing to permit their physician to answer certain hypothetical questions and in refusing a related offer of proof. The substance of the offers made already appeared in the record. Further, one such hypothetical question about which defendants complain was in fact answered in full, and such answer was never stricken from the record.

Section 24-340, R. R. S. 1943, provides: "The reporter shall attend all terms of the district court held within and for the district for which he is appointed, and shall make a stenographic report of all oral proceedings had in such court, including the testimony of witnesses with the questions to them, verbatim, *and any further proceedings or matter when directed by the presiding judge so to do,* or requested by either party to said proceeding, and, when requested at the beginning or during the progress of the trial by any party to the proceedings, all comments and statements made by the judge in the presence of the jury shall in all cases be taken down and recorded by the reporter; but the parties may, with the consent of the judge, waive the re-

cording by such reporter of any part of the proceedings herein required to be taken. *Arguments to the jury shall not be recorded;* and whenever, during the progress of the cause, any question arises as to the admissibility or rejection of evidence or any other matter causing an argument to the court, such argument shall not be recorded, but the reporter shall briefly note the objection made and the ruling of the court thereon, and any exceptions taken by either party to such ruling." (Italics supplied.)

In that connection, defendants argued that the trial court erred in denying defendants' request to have all of plaintiff's final arguments to the jury officially reported. In doing so, they cited and relied upon Ripley v. Godden, 158 Neb. 246, 63 N. W. 2d 151, which is clearly distinguishable.

The trial court had theretofore excluded exhibit No. 29, a schematic drawing which illustrated plaintiff's theory about where and how the collision occurred, because it constituted an argument by counsel for plaintiff, but stated to counsel and the jury that such "ruling does not go to the extent of preventing the plaintiff from using the drawing in arguing to the jury about the relationship of the various details disclosed in the testimony." Thereafter, but before the cause was argued to the jury, an all-inclusive objection of counsel for defendants to the display and use of exhibit No. 29 in argument was overruled, whereupon defendants requested that plaintiff's entire final arguments should be reported by the official court reporter. This the court declined to do, but did direct the reporter to remain available during the course of the arguments for the purpose of recording any objections made during such arguments. In argument, as counsel placed exhibit No. 29 upon an easel in view of the jury, defendants requested that such part of plaintiff's argument should be reported, which was done.

We believe the applicable and controlling general

rule appears in Caesar v. Wegner, 262 Wis. 429, 55 N. W. 2d 371, wherein the court, citing authorities, said: "While it is not the duty of the reporter to take down the arguments to the jury unless he is directed to do so, he should be available; and if objections are made or controversy arises during the course of the argument, the court, whose duty it is to be present at all stages of the trial, should direct a record to be made." See, also, Sandomierski v. Fixemer, 163 Neb. 716, 81 N. W. 2d 142. We conclude that the trial court complied with such rule in every respect, and failure to require the reporting of all of plaintiff's final arguments was not prejudicial to defendants.

Further, generally a trial court may in its discretion permit counsel, in addressing the jury, to display and use schematic drawings, diagrams, and maps, not put in evidence, by way of illustration or elucidation of evidence actually adduced, provided the jury understands that they are employed merely for such purposes and are not of themselves evidence in any sense. 53 Am. Jur., Trial, § 490, p. 395; 88 C. J. S., Trial, § 177, p. 348; Annotations, 9 A. L. R. 2d 1046, 37 A. L. R. 2d 662, 44 A. L. R. 2d 1205, L. R. A. 1918 D 80.

Contrary to defendants' contention, we conclude from an examination of the evidence adduced, and arguments made by plaintiff's counsel with relation to exhibit No. 29 in connection with demonstrative photographs and other evidence appearing in the record, that the trial court did not abuse its discretion.

Defendants argued that the trial court erred prejudicially in giving instructions Nos. 11 and 13, and in failing to properly instruct upon their theory of defense as shown by the pleadings and evidence. We sustain that contention.

In that connection: "It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence.

"A litigant is entitled to have the jury instructed as

to his theory of the case as shown by the pleading and evidence, and a failure to do so is prejudicial error.

"It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence. This rule applies to the affirmative defense of contributory negligence." Krepcik v. Interstate Transit Lines, *supra*.

In such respect, the rule also applies in cases wherein defendant pleads and adduces evidence that plaintiff's driver was negligent in certain specified particulars and that such negligence was the sole proximate cause of the accident and injuries. See, also, Krepcik v. Interstate Transit Lines, 153 Neb. 98, 43 N. W. 2d 609, wherein we said: "It is the uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to the specific acts so alleged and supported."

It should be noted that this is not a case wherein defendants pleaded generally that the negligence of plaintiff's driver was the sole proximate cause of the accident and thereby left themselves in a position about which they could not complain if the court failed to submit specific claimed acts of negligence. However, as heretofore noted, defendants pleaded that plaintiff's driver was negligent in certain specific particulars as alleged aforesaid, and that such negligence was the sole proximate cause of the accident, yet the trial court erroneously failed to specifically submit defendants' theory of defense as alleged by them. In that connection, the court only recited in instruction No. 2: "Defendants claim that the sole cause of the collision was the negligence of plaintiff's driver, Joe Tetro," and "The plaintiff has filed a reply denying the affirmative claims made by the defendants." In that connection, instruction No. 3 said in part: "The 'burden of proof' is the duty resting upon a party who claims a fact to be true, to establish such fact by a preponderance of the evidence."

Such language, when read in the light of the aforesaid language contained in instruction No. 2, erroneously left a clear inference that in such respect defendants did have a burden of proof which was prejudicial to defendants.

"The purpose of an instruction is to furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict; and, with this end in view, it should state clearly and concisely the issues of fact and the principles of law which are necessary to enable them to accomplish the purpose desired." Langdon v. Loup River Public Power District, 144 Neb. 325, 13 N. W. 2d 168. See, also, Barney v. Adcock, *supra*.

"Where an instruction assumes to define the whole law of the case but omits a material element therefrom, it is reversible error which may be relied upon although no proper instruction has been requested by the party seeking to take advantage of the defect.

"An instruction which conflicts with propositions of law properly and correctly stated in another instruction in the same charge on a vital issue of fact, and tends to mislead or confuse the jury in deliberating on conflicting evidence, is erroneous and prejudicial." Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146, 75 N. W. 2d 661. See, also, Brooks v. Thayer County, 126 Neb. 610, 254 N. W. 413.

"Where a party has produced proof tending to sustain his theory of the case, he is entitled to have such theory submitted to the jury by suitable instructions, without qualifying words calculated to mislead the jury into the belief that, although they may find the theory of such party to be true, they may return a verdict for the opposing party." Brownfield v. Union Pacific R. R. Co., 74 Neb. 440, 104 N. W. 876.

"An error in an instruction is not cured by the giving of other instructions, where such error consists, not of an omission of some material fact, but of an affirmative statement by the court which, when considered

with the other instructions, tends to confuse the jury." Wilch v. Western Asphalt Paving Corp., 124 Neb. 177, 245 N. W. 605.

In the light of such rules aforesaid relating to instructions, we turn to the question of whether or not instructions Nos. 11 and 13 were prejudicially erroneous. We conclude that they were.

Instruction No. 11 first recited six alphabetically-designated circumstances which should have applied to and been considered by reasonably prudent drivers in the same position as the drivers here involved. All of the instruction except the last paragraph simply stated a rule of law which could and did have application to the duties of both drivers with respect to such circumstances. Defendants' first contention is that such instruction as it related to both drivers failed to give defendants the benefit of the rule that: "A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highway will use them in a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accordance with such assumption." Paddack v. Patrick, 163 Neb. 355, 79 N. W. 2d 701. In that respect, we believe that in the light of the language of the instruction, which is too voluminous to recite here, such portion of the instruction was not prejudicial to defendants.

On the other hand, the last paragraph of instruction No. 11 read: "If you find that the defendant failed to exercise the judgment of a reasonable prudent man in controlling the position and course of the power wagon and trailer in view of the circumstances and conditions shown by the evidence, you may find the defendant negligent and find that the plaintiff's first proposition has been established." No precautionary language appears in the instruction with relation to the important factors of "preponderance of evidence as related to defendants" or to "proximate cause" with relation to

either driver, and, in that connection, the jury was not told alternatively what its findings should be if it found from the evidence that plaintiff's driver failed to exercise the judgment of a reasonably prudent man. The instruction, having application to both drivers and being simply the statement of a rule of law, the last paragraph should have been either omitted or the instruction should have been clarified by setting forth the obligation of each driver and the consequences to each resulting from a violation thereof.

Also, the jury was confronted with and requested to apply the language, "and find that the plaintiff's *first proposition* has been established." (Italics supplied.) The question presented was: Did such language refer to defendants' failure to take into consideration the six alphabetical circumstances theretofore set forth and thus fail to exercise the judgment of a reasonably prudent man, or did it refer back to paragraph 1 of instruction No. 5 which set forth defendants' alleged negligence? If it referred to the former, the instruction erroneously conflicted with instruction No. 5. If it referred to the latter, as we think after careful examination the court intended, no language was used referring back to paragraph 1 of instruction No. 5 or pointing out and defining such "first proposition" or telling the jury what it could find by use of clarifying language. The language used was so conflicting, incomplete, and misleading that we fail to observe how jurors, however intelligent as laymen, could discern its relation to paragraph 1 of instruction No. 5.

Instruction No. 13 first informed the jury that if it found that negligence by a defendant was a proximate cause of the injury, "such defendant may be held responsible for the entire result even though his negligence alone would not have brought about the entire result, and even though the evidence might show another to have been negligent." It then went on to say: "The burden upon the plaintiff to show that negligence of the

defendant was a proximate cause is not changed by the contention of the defendants that the conduct of Joe Tetro was the sole proximate cause of plaintiff's injuries. *You are not required to decide whteher* (sic) *Joe Tetro was negligent in any way.*" (Italics supplied.) Without qualifying such italicized language, by adding thereto "if you find that defendant was negligent in one or more particulars as alleged and that such negligence was a proximate cause of the accident," the instruction was incomplete, conflicting, and misleading. The italicized language should have been either omitted or qualified as aforesaid. Also, a double reference in the instruction respectively to, "you may find for the plaintiff upon the second proposition," and "you will find for the defendant upon the second proposition," without referring back to paragraph 2 of instruction No. 5 or without pointing out and defining such "second proposition" or telling the jury what it could find by use of clarifying language, was incomplete, confusing, and misleading.

In our discussion and disposition of defendants' assignments of error with relation to instructions, we have not overlooked the rule that: "Instructions are to be considered together, to the end that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof." Granger v. Byrne, *supra*. We have simply concluded that such rule is not controlling in the case at bar.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is reversed and the cause is remanded for new trial. All costs are taxed to plaintiff.

REVERSED AND REMANDED.

JOHN PEW, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

83 N.W. 2d 377

Filed May 31, 1957. No. 34174.

1. **Rape.** The exertion of force by the accused or resistance by the female is not essential to the commission of assault with intent to commit rape if the latter is incapable of giving consent because of her age and the accused is at least 18 years of age.
2. ———. In a prosecution for assault with intent to commit rape, if the prosecutrix testifies to facts constituting the offense and the accused denies the commission of the crime, the testimony of the prosecutrix must be corroborated on material points by other evidence to justify or sustain a conviction of the accused.
3. ———. It is not essential in such a case that the prosecutrix be corroborated by other evidence as to the principal act constituting the offense but it is indispensable that she be corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue.
4. ———. In a prosecution for an assault with intent to commit rape of a chaste female less than 18 years of age, proof of facts and circumstances justifying a finding, independent of her testimony, that accused had opportunity and inclination to assault her with intent to ravish her, may be sufficient corroboration of direct and positive evidence by her that he did so.
5. ———. If an accused, at least 18 years of age and capable of completing the indulgence he seeks, takes hold of or physically abuses or injures the person of a female prohibited because of her age from giving consent, with the intention of then having sexual intercourse with her, a finding is justified that he thereby committed the offense of assault with intent to rape.
6. **Criminal Law: Appeal and Error.** The credibility of witnesses and weight of evidence are for the jury to determine in a criminal case and the verdict of the jury may not be disturbed by this court unless it is clearly wrong.

ERROR to the district court for Hitchcock County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Charles M. Bosley, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

The charge made by defendant in error against plaintiff in error, referred to as the accused, is that on or about July 28, 1956, in Hitchcock County the accused, a male person more than 18 years of age, unlawfully assaulted Irene Barnes, a chaste person who was less than 18 years of age, with the intent to rape and carnally know her. §§ 28-408 and 28-409, R. R. S. 1943. The plea thereto by the accused was not guilty. The result of the trial of the charge was a verdict of guilty. A new trial was denied and accused was adjudged to be confined in the Nebraska State Penitentiary. He contests the legality of the conviction and sentence by petition in error. The assignment of error relied upon and discussed in this court is that the evidence is insufficient to sustain the conviction and judgment.

The circumstances of this case as recited by the evidence were as follows:

Irene Barnes, herein called the prosecutrix, would have been 16 years of age December 6, 1956. She was a chaste person. She had been, since May 13, 1956, living with Luella Green and Donald Green, her sister and brother-in-law, respectively, on a farm about 8 miles from Trenton. She had on week ends, commencing with June 24, 1956, been employed and served as a baby sitter in the home of the accused without unusual incident until the experiences complained of in this case. The distance between the home of the sister of prosecutrix, herein designated the Green home, and the farm home of the accused, herein spoken of as the Pew home, was considerable and the prosecutrix remained over night in the home of the latter on each occasion she was there as a baby sitter. When the services of the prosecutrix were desired, usually the accused, but on some occasions his wife, Mary Lu, came for her at the Green home and later returned her to it. Luella Green and her husband had, before March 1, 1956, lived about one-half mile from where the accused

and his family resided. The two families were neighbors and friends and after the former moved to the Trenton vicinity the two families continued to visit each other occasionally.

The accused, 32 years of age, was married and lived with his wife and four children on a farm east of Palisade. The ages of the four children were 7 years, 5 years, 3 years, and 10 months. The nearest house to the Pew home was 2 or 3 miles. The wife of the accused and two of their children had gone to Colorado and the other children were with the mother of the wife of the accused in McCook on July 28, 1956. There was no member of the family except the accused at the Pew home on that date or the following day.

The accused came to the Green home in his automobile shortly before noon on July 28, 1956. He saw and talked with prosecutrix and her sister, Luella Green. He asked them if the prosecutrix could baby sit for him. The prosecutrix said she would. Her sister agreed if he would bring her back early the next morning because they intended to attend a club picnic that day. The 28th of July 1956 was a Saturday and the picnic was Sunday. The prosecutrix prepared to go with the accused. She took with her a change of clothing. While she was getting ready the accused and her sister visited. She had prepared dinner and asked the accused to stay and have dinner with them. He declined the invitation and gave as the reason that his wife, Mary Lu, would have dinner ready for them when they reached the Pew home. During the trip to the home of the accused he and prosecutrix talked of his wife and children and accused said he had to hurry home because his wife would have dinner ready and that "they were going out that night."

It was about 1 p. m. when the accused and the prosecutrix arrived at the Pew home. There was no one there and she asked accused where his wife and children were. He did not tell her. She asked him repeatedly and he

finally said: "* * * they went to the hills." He explained this meaning later saying that they had gone to the mountains of Colorado. She asked accused to return her to the Green home. He refused and caressed her breasts and attempted to make love to her. He made an effort to insert his hand inside her dress but she prevented him. He pushed her down in a chair and continued to molest her. She opposed his advances by hitting, kicking, and pushing him away and she demanded that he discontinue his wrongful behavior and treat her properly. He became angry and left about 2 p. m. He did not say where he was going or when he would return. The prosecutrix was alone at the Pew home until about 5:30 p. m. when the accused came home. He drank three or four beers before he went away and when he came back he brought a supply of beer and gin. He offered prosecutrix a drink of the latter. She declined and he forced her to drink it. He then put his arms around her and attempted to get her on a davenport. She made the best effort she could to prevent him but he got her arms behind her and forced her onto it. He then released her arms and she got away from him. He continued to follow and molest her. He had her on the davenport two or three times and indulged in conduct of such a character as to permit of no doubt of his intention and purpose to ravish her. He injured her neck. He struck her with his fist and injured her. He inflicted bruises on both of her legs above the knees and on one of her arms. He scratched the other arm. He broke one of the shoulder straps of her slip and otherwise tore it. On one occasion while she was on the davenport he attempted to remove her clothing. At one time the accused said to the prosecutrix during these experiences: "I ought to rape you." At another time he said: "I am going to rape you."

Don Follett, hereafter mentioned as Follett, an unmarried man about 32 years of age and a long-time acquaintance and friend of the accused, came to the

Pew home about 7 or 7:30 p. m. When he came to the house and knocked at the door the accused had the prosecutrix on the davenport. He released her and she admitted Follett. He came because of an understanding when he and the accused met while he was away from home that afternoon. The accused, sometime after Follett came to the house, renewed his conduct of molesting the prosecutrix. Follett interfered and demanded that the accused desist.

Two of the Pew children were with the mother of Mrs. Pew in McCook. The accused said the prosecutrix had to go with them to McCook to get the children. She declared she was not going to McCook and stated that she wanted to go home. The accused demanded that she go to McCook so that she could care for the children when they got back that night. The three of them went to McCook in the automobile of Follett who operated it. On the trip to McCook the accused acted improperly toward the prosecutrix in ways similar to his violations at his home during the afternoon and evening. He was displeased at the declination of the prosecutrix to his desires and he hit her on the head with his fist which caused a swelling to result. The accused and Follett, when they got to McCook, left prosecutrix in the parked automobile and entered a bar where they remained for a considerable time. They then proceeded to a dance at Indianola. They did not see or get the Pew children at McCook. They went from the dance to the Pew home and arrived there about 12:30 Sunday morning, July 29, 1956. They occupied separate rooms and there was no further unusual incident that night.

The prosecutrix awoke about 5:30 or 6 o'clock on Sunday morning. She got up and dressed. Later the accused was awake and he arose and drank some beer. The prosecutrix prepared breakfast and the accused ate. His conduct towards her for about an hour was very much the same as it was the preceding afternoon and

evening. She slapped him and pushed him away but he persisted. She repeatedly told him she wanted to go home and he said he was not going to take her home. The accused got his hands on her breasts and her legs and pulled up her dress. She was afraid of him. Follett was still asleep. She got out of the house and ran. She had decided to go to the vacant Crampton house about a half-mile away to see if there was anyone there. The accused followed her in an automobile, overtook her, drove in front of her, and made her get in the car and return to his home. She told him that she was going home because he would not take her. Follett was up when they got back and prosecutrix asked him if he would return her to the Green home. He said he would and he did in his automobile. The three of them left the Pew home about 8:30 or 9 a. m., went to the Green home, and met and talked with the sister of prosecutrix and her husband. Nothing was said about the happenings that had transpired in the interval between the time the prosecutrix left the Green home the day before until she returned there. Luella Green, hereafter spoken of as Mrs. Green, noticed that the prosecutrix did not act naturally. She seemed scared and unusually quiet. She said very little to her sister or any of them. She went to her room and stayed there much of the time. She did not speak when the conversation was directed to her. Mrs. Green said she was in McCook Saturday and that she met Mrs. Mihm who said that Mrs. Pew was away from home. The accused said in reference to this that they took the children back to McCook that morning. Mrs. Green asked him where Mary Lu was and he said she was up in the hills. Mrs. Green said that was what she had heard and the accused said the two little girls were with Mary Lu's mother. Mrs. Green asked him where they were then and he said they took them back to McCook.

The next day Mrs. Green asked prosecutrix if Mary Lu had been gone. Prosecutrix did not answer but she

commenced to cry. She made her sister promise not to tell anything that was told her. The prosecutrix said the accused had declared that if she told what had taken place, something terrible would happen to her. Prosecutrix told her sister all that had taken place, as she testified later in the trial of this case. Mrs. Green then saw the bruises on the right arm, on both legs above the knees, and the injured place on the neck of the prosecutrix. Mrs. Green went to the Pew home on Tuesday afternoon, found the accused there alone, and talked with him. She asked him what had happened and he at first denied that he had done anything improper but later he told her he had tried to rape prosecutrix but he did not accomplish it.

The testimony of Don Follett, produced on behalf of the accused, corroborates in some respects the version of the happenings as related by the prosecutrix. The accused did not testify in the case. He relied upon his plea of not guilty and the presumption of innocence.

The elements of the offense charged against the accused that he was a male person of more than 18 years of age at the time alleged; that the prosecutrix was a female less than 18 years of age and a virgin at that time; and that the offense was committed in Hitchcock County, Nebraska, were supported by substantial and uncontroverted evidence of probative force sufficient to support the verdict of conviction. The remaining element of the offense charged was that the accused at the time stated unlawfully made an assault on the prosecutrix with intent of the accused to have sexual intercourse with her. She was then more than 15 and less than 18 years of age and a virgin. It is unimportant whether accused intended to accomplish the act charged against him with the consent of the prosecutrix and without force exerted by him. She was incapable of consenting to the indulgence he sought or to an assault by him with an intent by him to secure such indulgence. The exertion of force by the accused or resistance by the

female is not essential to the commission of the crime of assault with intent to commit rape if the latter is more than 15 and less than 18 years of age and chaste and the accused is at least 18 years of age. Hughes v. State, 154 Neb. 86, 46 N. W. 2d 904.

In a prosecution for assault with intent to commit rape, if a prosecutrix testifies to facts constituting the offense and the accused denies the commission of the crime, the testimony of the prosecutrix must be corroborated on material points by other evidence to justify or sustain a conviction of the accused. Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380. However, it is not essential in such a case that the prosecutrix be corroborated by other evidence as to the principal act constituting the offense but it is indispensable that she be corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue. Onstott v. State, *supra;* Medley v. State, 156 Neb. 25, 54 N. W. 2d 233; State ex rel. Klostermeier v. Klostermeier, 161 Neb. 247, 72 N. W. 2d 848. The prosecutrix testified in detail of the facts constituting the offense as related herein in the recitation of the circumstances of the case. The accused by the plea of not guilty interposed by him denied all that was charged or proven against him. The prosecutrix was corroborated by undisputed evidence as to many of the material matters included in her testimony. In the circumstances of this case proof of facts justifying a finding, independent of the testimony of the prosecutrix, that accused had opportunity and inclination to assault her with intent to ravish her was sufficient corroboration of direct positive evidence by her that he did so. Whetstone v. State, 99 Neb. 469, 156 N. W. 1049; Stapleman v. State, 150 Neb. 460, 34 N. W. 2d 907.

The accused argues that intent is an essential element of the offense charged against him and that the evidence does not support a finding against him in this respect. The intent with which an act is done is generally a mat-

ter of inference from the nature of the act and the circumstances surrounding its commission. Intent, when important, may not be capable of and is not required by law to be shown by direct evidence. It may be established by or deduced from facts and circumstances which characterize the transaction and from which the existence of intent may reasonably be inferred. If intent is an essential element of a crime, as it is in this case, to justify a conviction, the circumstances must be of so conclusive a nature as to show intent beyond a reasonable doubt. Prichard v. State, 135 Neb. 522, 282 N. W. 529. If an accused is at least 18 years of age and capable of completing the indulgence he seeks, takes hold of or physically abuses or injures the person of a female incapable of consent because of her age, with the intention to then have sexual intercourse with her, a finding is justified that he thereby committed the offense of assault with intent to rape. Beer v. State, 129 Neb. 366, 261 N. W. 824; Prichard v. State, *supra*. The wrongful conduct of the accused toward prosecutrix included all of the acts above enumerated and many more. They were indicative of his degrading desires and lustful intention.

The assignment of insufficiency of evidence to justify the conviction is without foundation. The proof permitted a finding of guilt of the accused of the offense charged. The credibility of witnesses and weight of evidence are for the jury to determine in a criminal case and the verdict of the jury may not be disturbed by this court unless it is clearly wrong. Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701. The verdict in this case is not clearly wrong. The judgment should be and it is affirmed.

AFFIRMED.

WILLIAM A. ECKER, ADMINSTRATOR OF THE ESTATE OF MARGARET A. ECKER, DECEASED, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, ET AL., APPELLEES.

83 N. W. 2d 551

Filed June 7, 1957. No. 34099.

1. **Trial.** A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence: Trial.** However, in a jury case where the evidence adduced to sustain issues of negligence and proximate cause are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the issues as a matter of law rather than submit them to a jury for determination.
3. **Witnesses.** As a general rule, a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion.
4. **Negligence.** Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributed to the injury complained of as a proximate cause.
5. ———. The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred.
6. ———. Ordinarily, where the negligence of one party is merely passive and potential causing only a condition while that of the other is the moving and effective cause of the accident, the latter is the proximate cause.
7. **Husband and Wife: Negligence.** In an action by plaintiff for his own benefit to recover for pecuniary injury which he has suffered by reason of the death of his wife, wherein the evidence discloses that plaintiff was guilty of negligence more than slight as a matter of law which proximately contributed to or caused the accident and death, it is the duty of the court to direct a

verdict for defendant.

8. **Negligence.** Likewise, when in such an action the evidence discloses that plaintiff's decedent was guilty of negligence more than slight as a matter of law which proximately contributed to or caused the accident and death, it is the duty of the court to direct a verdict for defendant.

9. ———. A person who knowingly and of his own volition exposes himself to obvious danger cannot recover damages for any injury which he might have avoided by the use of reasonable care.

APPEAL from the district court for Keith County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Bertrand V. Tibbels, Firmin Q. Feltz, and *Arthur R. Johnson,* for appellant.

F. J. Melia, George C. Holdrege, James H. Anderson, and *Frank J. Given,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiff, William A. Ecker, as administrator of the estate of his wife, Margaret A. Ecker, deceased, and for his own benefit, brought this action against defendants, Union Pacific Railroad Company, a corporation, and Edward M. Jensen, its engineer, seeking to recover damages for the death of plaintiff's wife, which was alleged to have been proximately caused by negligence of defendants. Hereinafter, William A. Ecker will be called plaintiff and Margaret A. Ecker, deceased, will be called plaintiff's wife or decedent. Defendant Union Pacific Railroad Company will be called the railroad company, and defendant Edward M. Jensen will be called the engineer, but when speaking of both they will be called defendants.

Plaintiff alleged in his petition that his wife's death occurred at about 2:46 a. m. on May 11, 1952, when his 1940 Chevrolet automobile, operated by him in a northerly direction, became stalled upon a rough and pitted railroad crossing installed by defendant railroad com-

pany, whereat its engine and train, approaching from the west, collided therewith. The alleged negligence of defendants was in effect that the railroad company failed to maintain and keep in repair its crossing where the collision occurred, as required by section 75-220, R. R. S. 1943; and that defendant engineer approached the crossing at an excessive rate of speed without keeping a proper lookout or giving timely warning, and failed to have the railroad company's engine and train under reasonable control in order to timely avoid collision with plaintiff's car after it became stalled upon the crossing.

Defendants' joint answer admitted that its engine and train approaching from the west, and a car driven by plaintiff in a northerly direction, collided at or about the time and place alleged, which resulted in the death of plaintiff's wife, who was a passenger in plaintiff's car. Defendants admitted that the railroad company had maintained and repaired the crossing since its installation. They then denied generally and alleged that the proximate cause of the collision and death of plaintiff's wife was her contributory negligence and the contributory negligence of plaintiff, which negligence was respectively more than slight as a matter of law when compared with any negligence of defendants. Plaintiff's reply was a general denial.

Upon trial to a jury and at conclusion of plaintiff's evidence, defendants' motion to direct a verdict and dismiss for the reason that the evidence adduced by plaintiff was insufficient to support a verdict in favor of plaintiff and against defendants or either of them was sustained, and judgment was rendered dismissing plaintiff's action. Thereafter, plaintiff's motion for new trial was overruled and he appealed, assigning only: "That the court erred in sustaining defendants' motion, made at the close of plaintiff's case, for dismissal of the action." We conclude that the assignment has no merit.

Decision depends upon the undisputed evidence ad-

duced in plaintiff's behalf and rules of law applicable thereto. In arriving at the conclusions hereinafter set forth, we are mindful of the following well-established rules: " 'A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.' Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175. However, we must also bear in mind that where the facts adduced to sustain an issue are such that reasonable minds can drawn but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. Witthauer v. Paxton-Mitchell Co., ante p. 436, 19 N. W. 2d 865." Loudy v. Union P. R. R. Co., 146 Neb. 676, 21 N. W. 2d 431. See, also, McIntosh v. Union P. R. R. Co., 146 Neb. 844, 22 N. W. 2d 179.

In that connection, as held in Leach v. Treber, *ante* p. 419, 82 N. W. 2d 544: "As a general rule, a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion."

In Guerin v. Forburger, 161 Neb. 824, 74 N. W. 2d 870, this court held: "The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred.

"Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooper-

ating with actionable negligence for which defendant is responsible, contributed to the injury complained of as a proximate cause."

In Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673, this court held: "Although the question of proximate cause is ordinarily for the determination of the jury, where, upon the evidence produced, only one inference can be drawn, it is for the court to declare whether a given act or series of acts is the proximate cause of the injury."

In Loudy v. Union P. R. R. Co., *supra*, this court held: "Ordinarily where the negligence of one party is merely passive and potential causing only a condition while that of the other is the moving and effective cause of the accident the latter is the proximate cause." See, also, Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683.

It is generally the rule that in an action by plaintiff for his own benefit to recover for the pecuniary injury which he has suffered by reason of the death of his wife, wherein the evidence discloses that plaintiff was guilty of negligence more than slight as a matter of law, which proximately contributed to or caused the accident and death, it is the duty of the court to direct a verdict for defendant. Jones v. Union P. R. R. Co., 141 Neb. 112, 2 N. W. 2d 624; Crandall v. Ladd, 142 Neb. 736, 7 N. W. 2d 642.

In Moreland v. Chicago & N. W. Ry. Co., 117 Neb. 456, 220 N. W. 692, cited with approval in Rogers v. Chicago, R. I. & P. Ry. Co., 39 F. 2d 601, we concluded that a motorist on a highway who is crossing a railroad track must use alertness and vigilance before he has taken or remains in a position exposing himself to peril or has come within the zone of danger, so that his precaution may be effectual, and a failure to do so will be held to be contributory negligence more than slight as a matter of law barring recovery.

In Goldman v. Grand Trunk Western Ry. Co., 287 Mich. 289, 283 N. W. 583, the court concluded that an

automobile driver who remained in his car that was stalled on a railroad crossing at night and was struck by a locomotive whose headlight was visible for a minute or two before the accident, was guilty of contributory negligence precluding any recovery.

Also, in Kraft v. Pere Marquette Ry. Co., 262 Mich. 494, 247 N. W. 727, plaintiff's car stalled on defendant's tracks where there was a clear view of approaching danger for about one-half mile. Plaintiff claimed that she looked when her car stalled, and saw no train. She then tried to start her motor and when she looked again the train was so close that she had no time to get out of her car. In the opinion the court said: "Due care required vigilance on the part of plaintiff while trying to start the motor. She knew she was in a place of danger if a train came along; she had time and opportunity to get to a place of safety, and, as long as she remained in the automobile, ordinary prudence required her to maintain such a watch as would enable her to escape. If the trainmen should have seen her peril she also should have sensed her peril, and availed herself of opportunity to avoid injury. * * * Defendant's motion for a directed verdict on the ground 'That plaintiff herself, as a matter of law, under the undisputed testimony, is guilty of contributory negligence,' should have been granted."

Also, in Gulf, Mobile & Ohio R. R. Co. v. Freund, 183 F. 2d 1005, 21 A. L. R. 2d 729, a case comparable in material and relevant respects with that at bar, the court, after citing numerous authorities, said: "The conclusion is inescapable that the proximate cause of appellee's unfortunate accident was his negligence in remaining in a position of known danger when, by the exercise of care commensurate with the danger which he was bound to know and understand, his injury would have been avoided.

"The judgment of the District Court is reversed, and this case is remanded with directions to dismiss the

action." See, also, Horsley v. Chesapeake & Ohio Ry. Co., 191 Va. 628, 61 S. E. 2d 868.

As said by this court in Craig v. Chicago, St. P., M. & O. R. R. Co., 97 Neb. 426, 150 N. W. 374, quoting with approval from Chicago, B. & Q. Ry. Co. v. Schwanenfeldt, 75 Neb. 80, 105 N. W. 1101: " 'Individuals are required to have some regard for their own safety. Every person of mature years and in the possession of his faculties is bound to make a proper use of them to avoid danger, and we are all required to take notice of the fact that a railway crossing is a dangerous place, and he who makes use of it must exercise that degree of caution commensurate with the danger.' See, Koester v. Chicago & N. W. R. Co., 106 Wis. 460."

Likewise, in actions like the one at bar wherein the evidence discloses that plaintiff's decedent was guilty of negligence more than slight as a matter of law, which proximately contributed to or caused the accident and death, it is the duty of the court to direct a verdict for defendant. In Seiffert v. Hines, 108 Neb. 62, 187 N. W. 108, we said: "Here the deceased knew that the automobile was approaching the crossing; he was in a position to look and listen for approaching trains; had he done so he could have warned the driver of the danger, or alighted from the moving automobile. Having failed to do this, his negligence contributed to his injury, and amounted to more than slight negligence in comparison with that of the defendant."

Also, in Gade v. Carlson, 154 Neb. 710, 48 N. W. 2d 727, we said, citing other authorities and quoting from Kerwin v. Thompson, Belden & Co., 110 Neb. 251, 192 N. W. 692: " 'A person who knowingly and of his own volition exposes himself to an obvious danger cannot recover damages for any injury which he might have avoided by the use of reasonable care.' "

In Krouse v. Southern Michigan Ry. Co., 215 Mich. 139, 183 N. W. 768, an action was brought by a husband to recover for the death of his wife who was a passenger

with him in an automobile struck by defendant's interurban car at a grade crossing upon which the automobile had stalled. Therein the court sustained direction of a verdict for defendant because the evidence disclosed that decedent, having notice and knowledge of an obvious approaching danger and ample time and opportunity with the exercise of reasonable care to get out of the automobile to a place of safety, had negligently failed to do so. See, also, Southern Railway Co. v. Jett, 49 Ga. App. 638, 176 S. E. 700.

We are required to apply such rules to the undisputed evidence in the record before us, which shows substantially as follows: On May 10, 1952, plaintiff and his wife went from their farm home to Paxton in plaintiff's Chevrolet sedan. Plaintiff drove his car at all times involved. They arrived at Paxton about 6 or 6:30 p. m. and went to a bar where they stayed about an hour. While there plaintiff had a drink of whiskey sour. They then went to a cafe where they had an evening meal. About 8 or 9 p. m. they went back to the bar and stayed until midnight visiting with friends. There plaintiff drank two more whiskey sours and his wife probably had some. At midnight they left the bar and went back to the cafe where they visited with friends while they had sandwiches and coffee. About 2 a. m. they left the cafe and drove west on a highway toward the farm home of friends about 1½ miles from Paxton. Such home was located on the south side of defendant railroad company's double parallel tracks running east and west, where a dirt road from north to south crossed over such tracks and went on to their friends' home. There were open wooden gates located respectively on both the north and south ends of such dirt road at the railroad company's right-of-way lines.

Plaintiff and his wife, who sat in the front seat at his right, approached the north end of the crossing as they drove west on the highway north of the railroad tracks, then turned left toward the south upon the dirt road

and drove over the railroad crossing to their friends' home without any difficulty. Plaintiff had driven over that railroad crossing many, many times, and was familiar with its location and condition. Upon arrival at their friends' home, they saw no light, so, without stopping, they turned around and drove back north toward the railroad crossing in order to recross it and go back out to the highway. It was a dark night without fog, but there was frost enough on the ground to leave car tracks. When plaintiff was about even with the south gate, or 200 feet from the tracks, and traveling at about 10 miles an hour, he looked west and saw the headlights of defendant's locomotive in open country approaching the crossing about a mile or 1¼ miles away. He then went up on the crossing while driving in about the middle of the road. Plaintiff testified that the train was then about one-half or three-fourths of a mile, or even a mile, away.

Plaintiff testified that as he drove over the south rail, one front wheel of his car, which one he didn't know, dropped "way down deep" in a hole which he never otherwise defined. There his motor died and plaintiff told his wife to get out and go back of the car. She then got out of the right side of the car and plaintiff shut the car door. When she got out, the train was still three-quarters of a mile away. Thus it will be noted that with full notice and knowledge of the obvious approaching danger she had ample time and opportunity to escape to a place of safety by the exercise of ordinary care, but she did not do so. After she got out, plaintiff looked again and saw the train about one-half mile away, so he started his motor twice and tried to go forward and then backward, but each time the motor died. He then turned off the ignition, took the key in his hand, looked up again and saw the train quite close, but he felt "it was far enough to get out of the way," so he opened the car door but couldn't get out of the way in time to avoid the accident, when the locomotive

hit the front end of his car and swung it around, whereupon the back end hit him and threw him into the train, from which he suffered serious injuries.

Plaintiff testified that when he looked up the last time he "saw the headlight of the locomotive and the locomotive itself of the train bearing down * * * just almost immediately before the accident happened"; that he "didn't know it was that close or I would have got out sooner." He heard no whistle or bell prior to the accident, but it is elementary that whether or not there was a whistle blown or bell rung was of no importance or consequence since both the plaintiff and his wife saw or could have seen the train at all times approaching in plain sight for at least one and a quarter miles, and knew of its approaching danger at all times. See Neusbaum v. Chicago & N. W. Ry. Co., 162 Neb. 754, 77 N. W. 2d 299. Thus, it will be noted that with full notice and knowledge of the danger approaching, plaintiff also had ample time and opportunity to escape to a place of safety by the exercise of ordinary care, but he did not do so.

The train was an extra freight traveling east at about 50 miles an hour, which makes applicable the rule that: "Beyond the limits of cities, villages, and towns no rate of speed of a train is generally in itself unlawful or evidence of negligence." Kennedy v. Chicago, R. I. & P. R. R. Co., 156 Neb. 345, 56 N. W. 2d 446.

The train was about four-fifths of a mile long and contained 74 loaded cars and 12 empties. Its engine was equipped with an electric headlight which would light the ground about 1,000 feet ahead and also project a light for about one-quarter of a mile in such manner that at that distance you might see a signal box or telephone pole. There was no evidence that plaintiff's car headlights were even lighted, much less that they were visible to the engineer. Also, there is no evidence that the engineer failed to keep a proper lookout or slacken his speed or that he could have done so in time to have

stopped the train and avoided the accident.

As a matter of fact, after the accident the train did stop with its rear car 10 or 12 car lengths, or about a block or more, east of the crossing. Right after the accident, plaintiff's car was lying on its top, 6 or 7 feet south of the south rail of the crossing, and 16 or 18 feet east thereof. When the highway patrolman arrived a short time after the accident, which occurred at 2:46 a. m., plaintiff's car was about 9 feet from the south rail, with its front end about 16 feet from the traveled portion of the crossing, and its back end about 25 feet therefrom. However, it had then been moved by rolling it over toward the southeast and upon its right side by part of the train crew and passengers, in order to remove the dead body of plaintiff's wife which was lying partially under plaintiff's car. Where she had gone or remained after leaving plaintiff's car, when she knew that the train was approaching three-quarters of a mile away, during which time she had ample time and opportunity to have escaped to a place of safety before the collision, is not shown by any evidence. The only inference or conclusion that can be drawn from the evidence is that she was in a place of known danger with ample time and opportunity to have avoided it by the exercise of ordinary care, but failed to do so, and was thus guilty of contributory negligence, as was plaintiff himself, and that such negligence was respectively more than slight as a matter of law when compared with any negligence of defendants, which barred plaintiff's right of recovery.

When the ambulance arrived shortly after the accident, it drove across the railroad crossing satisfactorily, then turned around and drove back across it again without any difficulty. The highway patrolman who inspected the accident drove over the crossing from both directions without any difficulty. His examination of the crossing disclosed that it was rough and bumpy when he hit the rails, but there were no places or holes on it deeper

than 3 inches from the top of the rail. The sheriff's examination disclosed no deep holes on the crossing. Plaintiff's friends who lived nearby used the crossing almost daily, and even drove over it and back again on May 10, 1952, without difficulty, but they noticed that it was rough, with a fall-away at the rails about as deep as the rails. Plaintiff's brother, who owned adjacent land and used the crossing regularly, testified that the fall-away from the rails was 6 or 8 inches, or maybe as much as 10 inches. In that connection, however, photographs of the crossing and rails, taken from different directions right after the accident, together with enlargements of some of them, appear in the record. Contrary to plaintiff's contention, they do not disclose any deep pits or holes on the crossing, but only verify the testimony of the patrolman and sheriff heretofore recited. Consequently, the condition of the crossing itself could not be reasonably said to have caused plaintiff's car to stall thereon. To hold otherwise would be entirely speculative.

We find no competent evidence from which it could be reasonably concluded that defendant engineer was negligent in the operation of the train, which could make the doctrine of respondeat superior applicable. Thus, we are required to determine whether or not there was any competent evidence that defendant railroad company was negligent in any manner, which proximately caused the accident and injuries to plaintiff and the death of his wife. In that connection, we may assume for purposes of argument only that defendant railroad company failed to properly maintain and repair the crossing, yet conclude that the contributory negligence of plaintiff himself and his wife barred any recovery as a matter of law. The crossing itself was no more than a condition and not a cause of the accident and death.

Further, contrary to plaintiff's contention, and in the light of the foregoing evidence, plaintiff and his wife were not entitled to the benefit of the emergency rule,

nor to the doctrine of last clear chance, nor to the rule that they exposed themselves to danger in a reasonable effort to save a third person or his chattels from harm, nor to the rule that the instinct of self-preservation and disposition of men to avoid personal harm may, in the absence of evidence, raise the presumption that a person killed or injured was in the exercise of ordinary care. The following authorities respectively so dispose of plaintiff's contention: Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491; Carter v. Zdan, 151 Neb. 185, 36 N. W. 2d 781; Wolfinger v. Shaw, 138 Neb. 229, 292 N. W. 731; Peake v Omaha Cold Storage Co., 158 Neb. 676, 64 N. W. 2d 470.

For reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed. All costs are taxed to plaintiff.

AFFIRMED.

LARRY BEAR, BY LAWRENCE F. BEAR, HIS FATHER AND NEXT FRIEND, APPELLEE, V. ROY ALBERT AUGUY, APPELLEE, IMPLEADED WITH CHECKER CAB COMPANY, APPELLANT.
83 N. W. 2d 559

Filed June 7, 1957. No. 34123.

1. **Trial.** A motion for directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence.** Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which it would not have occurred.
3. ———. A traveler on a highway is required to exercise reasonable care for the safety of others thereon.
4. ———. What is reasonable care does not permit of definitive

statement applicable to all cases but the presence or absence of reasonable care must be determined by the facts and circumstances of each case.

5. **Automobiles: Negligence.** The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing.
6. ———: ———. The law requires a driver of a motor vehicle to have his car under such reasonable control as will enable him to avoid a collision with other vehicles, assuming that the drivers thereof will exercise due care.
7. ———: ———. The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance.
8. **Municipal Corporations: Negligence.** The violation of city ordinances or statutes regulating the use and operation of motor vehicles upon the highway is not negligence per se, but evidence of negligence, which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby, and where the evidence is such that reasonable minds may draw different conclusions therefrom, the question of negligence is for the jury.
9. **Negligence: Trial.** Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury.
10. **Infants: Negligence.** Whether or not a minor between 14 and 15 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law.
11. ———: ———. The degree of care required of a minor is that which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation.
12. **Trial: Appeal and Error.** Where the excessive amount in a judgment is subject to exact determination, a remittitur may be required as a condition of affirmance for the correct amount.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Gross, Welch, Vinardi & Kauffman, for appellant.

Lyle Q. Hills, for appellee Bear.

Abrahams & Kaslow, for appellee Auguy.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

The plaintiff brought this action by his father as next friend in the district court for Douglas County against Roy Albert Auguy and Checker Cab Company, defendants, to recover damages for personal injuries sustained by Larry Bear as a result of a collision between a motor bicycle he was riding and a taxicab owned by the defendant Checker Cab Company and driven by one of its employees. Defendant Roy Albert Auguy was made a defendant on the theory that he was the owner of a dog allegedly chasing Larry Bear at the time of the accident. The case was tried to a jury resulting in a verdict in favor of the defendant Roy Albert Auguy and the plaintiff, and against the defendant Checker Cab Company on two causes of action, fixing the amount of recovery on the plaintiff's first cause of action in the sum of $5,000 and on the second cause of action in the sum of $2,500. Judgment was entered on the verdict. The defendant Checker Cab Company filed a motion for judgment notwithstanding the verdict or, in the alternative, motion for a new trial on both causes of action, and for remittitur in the amount of $1,355.90 on the second cause of action. The motion for judgment notwithstanding the verdict was overruled and the plaintiff was ordered to remit $1,355.90 on the second cause of action. The remittitur was made by the plaintiff, and thereupon the motion for a new trial as to the plaintiff's second cause of action was overruled. From the orders overruling

the motion for judgment notwithstanding the verdict and motion for new trial, the defendant Checker Cab Company appealed. The plaintiff cross-appealed from the order of the trial court requiring him to file a remittitur.

For convenience we will refer to the parties as designated in the district court, to the plaintiff on occasions as Larry; to one of the plaintiff's witnesses, Leroy Christensen, as Leroy; and to the taxicab here involved as the cab.

The plaintiff's petition charged the defendant, whose employee was driving its cab, with negligence that constituted the proximate cause of the injuries sustained by Larry Bear as follows: (1) In failing to swerve or to stop his cab in time to avert a collision; (2) in driving at a speed in excess of what was reasonable and prudent under the conditions then existing; and (3) in failing to observe the plaintiff when he saw or in the exercise of ordinary care should have seen the plaintiff in time to have averted a collision.

In the second cause of action the plaintiff alleged that his father was required to expend money for medical and hospital expenses in order to attempt to cure him of injuries, and will in the future be required to go to further expense for the same; and that the father had assigned his claims for all such expenses to the plaintiff. The plaintiff asked for judgment on this cause of action in the amount of his father's loss and future medical and hospital expenses which will be necessary in order to attempt to cure the plaintiff's disability.

For answer to the plaintiff's petition the defendant Checker Cab Company denied all of the allegations contained therein which were not specifically admitted; admitted there was a collision between one of its cabs and a motor bicycle which was operated by the plaintiff; alleged that if the plaintiff suffered any injuries or damages as a result of such collision such injuries and damages were proximately caused by reason of the con-

tributory negligence of the plaintiff; and alleged that the plaintiff's negligence on such occasion was more than slight. The defendant prayed that the petition of the plaintiff be dismissed.

For reply to the answer of the defendant Checker Cab Company the plaintiff denied all allegations contained therein which were not admissions of the plaintiff's petition.

The defendant Checker Cab Company assigns as error the overruling of its motion made at the conclusion of the plaintiff's case for a directed verdict, and the overruling of the defendant's motion for directed verdict made at the conclusion of all of the evidence; that the trial court erred in failing to hold that the plaintiff was guilty of contributory negligence as a matter of law; and that the trial court erred in overruling the defendant's motion to set aside the verdict. No error is predicated on the instructions given by the trial court.

A motion for directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. See Colvin v. Powell & Co., Inc., 163 Neb. 112, 77 N. W. 2d 900.

Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury. See, Pierson v. Jensen, 150 Neb. 86, 33 N. W. 2d 462; Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112.

The record discloses that I Street in South Omaha runs east and west and Twenty-third Street runs north and south. At the intersection, Twenty-third Street is

32 feet from curb to curb and I Street is likewise 32 feet from curb to curb. At the time of the accident there was a stop sign on I Street requiring traffic to stop before entering the intersection. Twenty-third Street was a favored street, and there was no stop sign requiring traffic to stop before entering the intersection. The stop sign referred to is located on the northeast corner of the intersection, 19 feet 8 inches east of the east curb of Twenty-third Street. There was a street light located on the northeast corner of the intersection, and the light was turned on at the time of the accident. The accident happened at approximately 9 p.m., on May 18, 1952. The weather was clear, it was dark, and the pavement was dry.

The plaintiff, Larry Bear, testified that on May 18, 1952, he was 14 years of age. He was a freshman at South High School. He participated in freshman football and was interested in all types of athletics. After 7 p.m., May 18, 1952, he went to the home of Leroy Christensen who had a motor bicycle, and the two of them decided to go for a ride. Larry did not have a motor bicycle but knew a friend who had one. He and Leroy went to the friend's home and Larry borrowed the motor bicycle and they both went riding around the neighborhood and through city parks. Larry testified further that he was having trouble with the motor bicycle and was unable to detect what was wrong with it. The motor was cutting out and not running as it should. He decided to take the machine to a filling station located at Twenty-fourth and I Streets, and told Leroy what he was going to do. There was an understanding that they would meet at the filling station. In taking this course, going west on I Street and approaching the alley between Twenty-second and Twenty-third Streets, he heard a noise and looked down and saw a big black dog which he described as a German shepherd. This dog was right at the back wheel of the motor bicycle and was trying to grab his leg. At

one time the dog did get hold of his trouser cuff, but Larry pulled away. He testified that he was "scared to death." The dog continued to pursue him, barking and snapping at his leg. Larry was wearing strollers which gave no protection to his legs. He further testified that as he approached the intersection of Twenty-third and I Streets the dog continued to follow him. As he passed the stop sign and got to the corner he glanced down, the dog was still there, and it chased him into the intersection. As he entered the intersection he glanced up the street and saw a car 60 to 80 feet from the intersection. He glanced again momentarily and saw another car passing the first car he had seen. When he was in the intersection he felt himself being hurled through the air. He felt a tremendous jolt as he landed on the west parking along Twenty-third Street. He was conscious, but dazed, and was taken to a hospital by a rescue squad.

On cross-examination Larry testified that the alley between Twenty-second and Twenty-third Streets runs north and south, and the dog was about 10 feet west of the alley. After he passed the stop sign he saw the dog, but he did not see it after he entered the intersection. It would take 2 or 3 seconds to cover the distance from where he first saw the dog to the intersection, which was approximately 110 feet. That was the length of time he observed the dog. When he was 10 feet from the intersection he looked north for the first time. He was traveling 15 miles an hour and maintained that speed all the way past the stop sign and into the intersection. He believed he swerved the motor bicycle to the left after he got into the intersection. The dog got hold of his pants cuff when he was at the street light. He pulled back, and that swayed the motor bicycle. He was endeavoring to avoid the dog. It made another pass at his leg after he entered the intersection. He believed he would be able to escape the dog without having a collision with the car that he saw. When

he looked to the north he saw a second pair of headlights coming south in his direction. These headlights were south of the first pair of headlights, and continued south. That was the car that came in contact with his motor bicycle.

Leroy Christensen, in his testimony, related the facts as testified to by Larry with reference to procuring the motor bicycle, taking a ride, and agreeing to meet at the filling station. He testified that as he approached Twenty-third and I Streets he could see to the east and saw Larry coming up the street about a block away. He could see him under the street light at Twenty-second and I Streets. At that time Leroy was on the west side of Twenty-third Street, on I Street, facing east. Larry was coming from Twenty-second Street at a rate of speed of 15 miles an hour. As Larry came toward Leroy, Leroy heard a dog barking. That was when Larry's motor bicycle was between Twenty-second and Twenty-third Streets. Leroy kept watching the motor bicycle, and as it approached the intersection and arrived at the stop sign, the street light was shining and he could see the dog. It was a German police dog. He estimated it to be 26 inches tall. The dog was to the right of the motor bicycle and a little to the rear, keeping up with the motor bicycle. At that time Leroy saw a car coming from the north, about 120 feet north of the intersection. He testified that he was at an angle and could see both Larry and the car. He saw another car pass the first car. When the second car was passing the first car, both cars were about 100 feet north of the intersection, or about even with the second house north on the west side of Twenty-third Street. Larry was just by the stop sign, about to enter the intersection. At that time the car nearest the intersection was about 80 or 85 feet north of it. He continued to watch this car until the time of the collision. The car did not swerve, but continued on straight down the street and collided with the motor bicycle Larry was riding. The

motor bicycle was more than half way across the intersection. The car was halfway into the intersection. The front end of this car struck the motor bicycle. The collision occurred under the street light and Leroy saw that a cab was involved. Larry was thrown into the air to the south and fell on the parking in front of the first house on the southwest corner of the intersection. The cab proceeded on down the street and stopped in front of the third house south of the intersection. The motor bicycle was lying alongside the curb a little south of where Larry was lying. The cab was going 40 or 45 miles an hour at the time of the impact. He heard no sound of a horn.

Sebastian Breci, a witness for the defendant, testified that on the evening of the accident he and his wife were traveling in their car on their own side of the street, followed by a Checker cab. When he was about a quarter of a block beyond H Street, the cab passed their car. It was going at a speed of 25 or 30 miles an hour. After the cab had passed their car it proceeded into its own lane down to the corner of Twenty-third and I Streets. This witness's car was traveling 20 miles an hour. This witness further testified that he saw a boy approaching the intersection when his car was 60 to 80 feet from the intersection. The boy was on a motor bicycle and was near the telephone pole under the street light on the corner. He estimated the speed of the motor bicycle to be 20 to 25 miles an hour. The cab struck the motor bicycle when it was right in the center of the intersection. The motor bicycle had traveled about 20 feet from the time he first saw the boy. He stopped his car 5 to 10 feet behind the cab. The cab was about 10 feet past the intersection. He backed his car up, went around the cab, and parked 90 feet farther down the street. He got out of his car and saw the boy lying between the curb and the sidewalk. Most of the witnesses testified that Larry was lying on the parking in front of the first house on the southwest corner of the

intersection. He further testified that he first saw the boy when he came beneath the light which is located on the northeast corner of the intersection of Twenty-third and I Streets. He saw no dog, nor did he hear a dog bark. He was able to see the boy as he was thrown through the air.

The driver of the Checker cab involved in the accident testified that the cab he was driving was a 1951 Plymouth four-door sedan. He was proceeding south on Twenty-third Street and passed a car in front of him after he had driven through the intersection of Twenty-third and H Streets. This car was going 20 to 25 miles an hour and he passed it at a rate of speed of 25 to 30 miles an hour. As he approached the intersection of Twenty-third and I Streets he glanced to the left and saw a "moving object which was more or less a flash," and then there was a collision. He further testified that he was about the length of the cab from the intersection when he first saw the flash. When the collision took place, the boy on the motor bicycle was thrown into the air from the impact, came down between the hood and fender of the cab, and rode in that position. This witness further testified that he stepped on the brakes momentarily, and when the boy came down on the cab he relaxed the brakes because if he applied them hard it would throw the boy to the pavement. He then coasted the cab until he got to the side of the curb, and the boy sort of "lunged" off the cab. The cab continued to coast south about 20 feet and was brought to a stop a distance of 90 to 100 feet south of the intersection. The front of the cab, when it came in contact with the boy, was approximately 8 feet beyond the north curbline of I Street and around 8 feet from the west curbline of Twenty-third Street.

On cross-examination this witness testified that the cab was equipped with excellent brakes; that he slowed down to 15 or 20 miles an hour after passing the other car; that he could stop the cab within a distance of 30

feet at the speed he was going; that the left window of the cab was down; and that his vision was unobstructed as he approached the intersection. He stated that he heard a dog bark, but he did not see the dog. The boy was in the intersection when he first saw him. He was not relying on the boy stopping at the stop sign, because the boy was already in the intersection. The cab at that time was 15 to 18 feet north of the intersection. The cab proceeded a distance of 150 feet before it came to a stop, and was not clear into the intersection at the time of the impact. The impact carried the boy 24 feet across the intersection and about 50 feet south of the intersection before the boy was thrown onto the parking. The motor bicycle still rested on the cab and was carried a distance of 20 feet farther south.

There is also evidence that there was a slight upgrade on I Street approaching the intersection of Twenty-third Street, and leveling off at the intersection. The speed limit at the scene of the accident was 25 miles an hour. There was a seal-beam light at the center of the handlebars of the motor bicycle Larry was riding, which was turned on.

There is evidence that there are a number of dogs in the neighborhood and several large black dogs. Just which dog was involved in this accident is not clearly shown by the record.

Before determining the assignments of error, we set forth certain rules of law applicable to this case.

Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which it would not have occurred. See Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683.

A traveler on a highway is required to exercise reasonable care for the safety of others thereon. See Barney v. Adcock, *supra*.

"What is reasonable care does not permit of definitive statement applicable to all cases but the presence or ab-

sence of reasonable care must be determined by the facts and circumstances of each case." Barney v. Adcock, *supra.*

"The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing." Davis v. Dennert, *supra.*

The law requires a driver of a motor vehicle to have his car under such reasonable control as will enable him to avoid a collision with other vehicles, assuming that the drivers thereof will exercise due care. Pongruber v. Patrick, 157 Neb. 799, 61 N. W. 2d 578.

The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance. See Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250.

The violation of city ordinances or statutes regulating the use and operation of motor vehicles upon the highway is not negligence per se, but evidence of negligence, which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby, and where the evidence is such that reasonable minds may draw different conclusions therefrom, the question of negligence is for the jury. See, Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612; Segebart v. Gregory, 156 Neb. 261, 55 N. W. 2d 678.

The standard of care required of a minor such as the plaintiff at the time of the accident is set forth in Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d

607. The plaintiff was 14 years and nearly 8 months of age at the time of the accident, and cannot be charged with the same degree of caution required of an adult in guarding against possible accidents while traveling upon and crossing a street in a city. There is no arbitrary rule fixing the time at which a child during his minority may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered while engaged in such an activity. Whether or not negligence may be attributed to a minor of the age of the plaintiff is usually a matter for a jury under the circumstances of each case. It is only in an extreme situation where the facts show plainly knowledge and appreciation of the danger that may be incurred, if certain action is had, that a court may decide as a matter of law that a minor of such an age was guilty of negligence, or that his act or omission was the proximate cause of the happening in question. See, Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499; Rule v. Claar Transfer & Storage Co., 102 Neb. 4, 165 N. W. 883; Chicago, B. & Q. R. R. Co. v. Russell, 72 Neb. 114, 100 N. W. 156; Kauffman v. Fundaburg, 123 Neb. 340, 242 N. W. 658; McKinney v. Wintersteen, 122 Neb. 679, 241 N. W. 112; Siedlik v. Schneider, 122 Neb. 763, 241 N. W. 535.

The conduct of the plaintiff as shown by this record should not, his age considered, conclusively bar his right of recovery, conceding that he was a bright and intelligent boy, had lived in Omaha, was acquainted with the use of bicycles as most boys of his age are, and was familiar with the operation of motor bicycles having ridden thereon with other boys although this was the first occasion upon which he had operated one.

What is required of a minor is the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. Smith v. Smith-Peterson Co., 56 Nev. 79, 45 P. 2d 785, 100 A. L. R. 440; Sadlowski v. Meeron, 240 Mich. 306, 215 N. W. 422; Hackert v. Pres-

cott, 165 Minn. 134, 205 N. W. 893; Annotation, 107 A. L. R. 4; Annotation, 174 A. L. R. 1174; Collins v. Weise, 110 Neb. 552, 194 N. W. 450; 65 C. J. S., Negligence, § 146, p. 789; Locklin v. Fisher, 264 App. Div. 452, 36 N. Y. S. 2d 162.

The defendant argues that Johnston v. New Omaha Thomson-Houston Electric Light Co., 78 Neb. 24, 110 N. W. 711, on rehearing, 78 Neb. 27, 113 N. W. 526, 17 L. R. A. N. S. 435, is applicable and in justification of the defendant's contention that the negligence of the plaintiff was more than slight and barred recovery on his part. That case concerned an extreme situation, and the facts considered have no similarity to those of the instant case. That case was decided more than 40 years ago, and has not since been referred to or cited by this court as an authority. In Rule v. Claar Transfer & Storage Co., *supra,* the writer of the opinion considers it an exception to the general rule, and that its doctrine should not be further extended. The same would apply to Bixby v. Ayers, 139 Neb. 652, 298 N. W. 533.

The defendant argues that the plaintiff lived in the neighborhood where there were several dogs, was acquainted with the entire area, and knew the location of the stop sign; that he chose to ride this motor bicycle, which was equipped with dual exhausts and made a loud noise that would naturally attract dogs, at a rate of speed of 15 miles an hour at night; and that the plaintiff first heard the dog at the alley between Twenty-second and Twenty-third Streets and saw the dog 10 feet west of the alley which would be approximately 110 feet east of the intersection, therefore, the plaintiff was aware of the dog's presence for at least 120 feet before he entered the intersection, and the accident occurred slightly more than half way through the intersection. The defendant further argues that Twenty-third Street is 32 feet wide, consequently the total distance traveled by the plaintiff after he was aware of the presence of the dog was at least 136 feet; that accord-

ing to the evidence of an expert, a motor bicycle traveling at 15 miles an hour would travel 22 feet per second; that during this course of travel at least 6 seconds would elapse from the time the dog started chasing the plaintiff and the time of the impact with the Checker cab; that meanwhile the plaintiff passed a stop sign and a crosswalk and made no effort to turn in either direction; that he had observed the lights of approching vehicles, was hoping to cross the intersection ahead of traffic that he knew was approaching, and ignored the stop sign; and that under such circumstances the negligence of the plaintiff was more than slight and should bar recovery on his part.

The evidence adduced by the plaintiff shows that as he approached the corner of Twenty-third and I Streets, the dog was chasing him and he was frightened. As he arrived at the corner he looked down and the dog was still there. He was at all times endeavoring to get away from the dog, but it continued to chase him right up to the intersection, snapping at his leg. As he entered the intersection, he saw a car some distance up the street, and as he got into the intersection he glanced up and saw another car passing the car he had first seen. The second car collided with him. The dog was a large police dog and looked to the plaintiff like a German sheperd. It was about 26 inches tall, and it continued to bark and snap at the plaintiff's leg during the period it was chasing him. We will not repeat, but direct attention to, the evidence of Leroy Christensen heretofore set out wherein he details his version of the facts leading up to the accident and of the accident.

The defendant asserts that there is no evidence to show that the dog was a vicious or dangerous animal; and that it was identified as the Auguy dog which the plaintiff knew and which he testified had never bitten him. Apparently the jury found the evidence insufficient to identify the dog as the Auguy dog. Just which dog was chasing the plaintiff is not clear from the

record, nor do we know if the dog was vicious or dangerous. At any rate, the plaintiff was afraid of the dog and could not anticipate that the dog would not bite him.

In addition, the plaintiff points to the evidence of the defendant's witness Breci who testified that he saw the plaintiff before the plaintiff passed into the intersection. At that time this witness was a quarter of a block north of the intersection. The cab was 15 to 20 feet ahead of him, which would be 55 to 60 feet from the intersection. The driver of the cab did not swerve the cab, but continued in a straight course. Breci attempted to stop his car, and did stop it north of the intersection. An expert witness testified that if the cab was traveling 25 miles an hour, the speed limit in this residential district, the cab could be completely stopped within a distance of 55 or 60 feet. The cab was equipped with brakes more powerful than those used in the ordinary car. The cab driver testified that he could have stopped the cab within a distance of 30 feet; that his windshield was clear; and that there was nothing obstructing his view.

The evidence in the instant case is such that reasonable minds may draw different conclusions therefrom. This being true, the questions of negligence and contributory negligence are for the jury. See, Plumb v. Burnham, *supra;* Gleason v. Baack, 137 Neb. 272, 289 N. W. 349; Anderson v. Robbins Incubator Co., 143 Neb. 40, 8 N. W. 2d 446; Pierson v. Jensen, *supra;* and other authorities previously cited.

We conclude that the trial court did not commit prejudicial error as contended for by the defendant.

This brings us to the plaintiff's cross-appeal. The plaintiff contends that the trial court erred in requiring the plaintiff to file a remittitur in the amount of $1,355.90 as against the second cause of action wherein a verdict had been obtained by the plaintiff in the amount of $2,500. We fail to find any evidence to sustain an award exceeding $1,144.10.

The trial court instructed the jury with reference to the plaintiff's second cause of action in substance as follows: For his second cause of action the plaintiff alleged that his father was required to spend money for medical and hospital expense in order to attempt to cure him of his injuries and would in the future be required to go to further expense for the same. Then the plaintiff alleged that the father had assigned his claim for all such expense to the plaintiff. The plaintiff asked for a judgment on the second cause of action in the amount of his father's loss and future medical and hospital expense which would be necessary in order to attempt to cure the plaintiff's disability.

From an analysis of the trial court's instructions, the trial court limited the jury in its consideration of the second cause of action to making an award that would compensate for medical and hospital expenses previously incurred together with prospective expenses shown with reasonable certainty in the evidence. These expenses were shown by the evidence to total $1,144.10.

The plaintiff did not attack the court's instructions and does not seek a new trial. He seeks to avoid the remittitur. The remittitur is required under the evidence.

Where the excessive amount in a judgment is subject to exact determination, a remittitur may be required as a condition of affirmance for the correct amount. See, Colvin v. Powell & Co., *supra;* Moore v. Schank, 148 Neb. 228, 27 N. W. 2d 165; Roby v. Auker, 151 Neb. 421, 37 N. W. 2d 799.

We conclude that the assignment of error raised in the plaintiff's cross-appeal cannot be sustained.

For the reasons given in this opinion, we conclude that the verdict and judgment entered thereon by the trial court should be, and is hereby, affirmed.

AFFIRMED.

EDWARD SCHAFFER, APPELLEE, V. STRAUSS BROTHERS, APPELLANTS.
83 N. W. 2d 543

Filed June 7, 1957. No. 34144.

1. **Appeal and Error.** Under section 25-1919, R. R. S. 1943, and Revised Rules of the Supreme Court, Rule 8 a2(4), consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned.
2. **Trial.** In a law action where plaintiff offers evidence and rests and defendant moves for judgment in his favor and, the motion being overruled, defendant proceeds with the trial and introduces evidence in support of the defenses set up in his answer, he thereby waives the right to assign error in the ruling upon the motion.
3. **Attorney and Client.** An attorney's fee here, claimed under section 25-1801, R. S. Supp., 1955, is denied.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed.*

Healey, Davies, Wilson & Barlow and *Robert E. Johnson, Jr.*, for appellants.

Albert S. Johnston, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an action on an oral contract seeking to recover a balance alleged to be due the plaintiff for services as a foreman rendered the defendants, who were large-scale residence builders. Issues were made. Trial was had to the court. Plaintiff recovered a judgment. Defendants appeal.

We affirm the judgment of the trial court.

Plaintiff alleged that on or about September 1, 1951, he entered into a contract with defendants whereby he was employed as a foreman by defendants and that defendants agreed to pay him wages on the then current basis and, in addition thereto, defendants agreed to

pay the plaintiff the sum of $20 "referred to as a bonus," for the completion of the cement work on each residential unit constructed by defendants. He alleged the performance of his contract on 287 residential units; that he had been paid the $20 per unit for 216 units; and that he had not been paid for the remaining 71 units. He prayed judgment for $1,420, together with interest, costs, and attorney's fees.

The defendants demurred to the petition for the reason that it did not state a cause of action. The demurrer was overruled.

Defendants answered and admitted a contract of employment and expressly denied the allegation as to the $20 per unit payment. They admitted the completion of 287 residential units on or before July 1, 1953. They alleged that the contract of employment called for the payment of $20 per completed unit payable on or about Christmas time "to the then employed foremen who faithfully performed their duties throughout the year." They alleged a payment to plaintiff of $1,400 on July 11, 1953, which was an advance on the amount "of bonus" to be due at Christmas of 1953. They further alleged that prior to Christmas of 1953, plaintiff wrongfully abandoned his employment to their damage in the sum of $3,359.42.

They prayed for a denial of plaintiff's petition and for judgment of $1,400 and $3,359.42.

At the opening of the trial the defendants abandoned their claim for damages for the breach of the contract.

The trial court found for the plaintiff on his cause of action, denied recovery of the $1,400 on defendants' cross-petition, and denied attorney's fees to the plaintiff.

Defendants do not here assign error in the denial of their cross-petition. Nor does plaintiff assign error by cross-appeal as to the denial of attorney's fees in the trial court, although he asks for an allowance of attorney's fees in this court.

Defendants' assignments of error are:

"1. The Court erred in failing to sustain the demurrer of defendant to the petition of the plaintiff.

"2. The Court erred in failing to sustain the demurrer of defendant to the plaintiff's evidence.

"3. The decree of the Trial Court is contrary to the evidence.

"4. The Court erred in sustaining plaintiff's objection to testimony by one of the parties to the agreement as to the general understanding of the terms of the contract."

The established rule is: "Under section 25-1919, R. S. 1943, and Revised Rules of the Supreme Court, Rule 8 a2(4), consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned." Hartman v. Hartmann, 150 Neb. 565, 35 N. W. 2d 482. See, also, Okuda v. Hampton, 154 Neb. 886, 50 N. W. 2d 108; Trute v. Skeede, 162 Neb. 266, 75 N. W. 2d 672.

Defendants in their brief here do not discuss directly any of their assignments of error. They state three propositions of law which reduced down consist of the contention that a promise to pay a bonus must be based on a sufficient consideration; that such an agreement must have a definite time for payment or it is void for lack of consideration; and that to be enforceable nothing must be left open to future negotiations.

Defendants argue their propositions of law, making incidental reference to the pleadings and the evidence.

The question presented in the fourth assignment of error is not mentioned in the argument. No further attention will be given to it here.

The argument does not set out any basis for the contention that the petition failed to state a cause of action and hence was subject to demurrer for that reason. We see no reason for searching for possible defects that are not patent and not pointed out.

At the close of plaintiff's case-in-chief, defendants demurred to the evidence for failure of proof of the alle-

gations of the petition or a cause of action. The motion was overruled. Defendants then offered evidence. The defendants assign error for failure to sustain the demurrer to the evidence. The motion was equivalent to a motion for judgment for defendants.

The applicable rule is that in a law action where plaintiff offers evidence and rests and defendant moves for judgment in his favor and, the motion being overruled, defendant proceeds with the trial and introduces evidence in support of the defenses set up in his answer, he thereby waives the right to assign error in the ruling upon the motion. Bradstreet v. Grand Island Banking Co., 89 Neb. 590, 131 N. W. 956; Russell v. Electric Garage Co., 90 Neb. 719, 134 N. W. 253. The alleged error assigned is not sustained.

This brings us to the assignment that the judgment of the trial court is contrary to the evidence.

The evidence fully supports a finding as follows: Sometime in 1949 plaintiff went to work for the defendants at the agreed compensation of $2 per hour. About March 1, 1951, the compensation base was changed to a weekly wage of $88 a week and in addition $20 for each house completed to be paid to each foreman, including the plaintiff. A series of 118 houses was constructed under that compensation base, and payments were made of the weekly wage and the added compensation. Although the added compensation was referred to in the pleadings and the evidence as a bonus, it is patent that it was an integral part of the contract compensation.

About March 1, 1952, the weekly wage element of the compensation was changed to $100 a week. The $20 element remained unchanged. While that agreement was in full force and effect, a series of 287 units was completed. Plaintiff was paid his weekly wage and $20 for 216 units. He was not paid for the remaining 71 units.

In July 1953 defendants put a new wage scale into effect whereby its foremen, including plaintiff, were to be paid $125 a week and a share of the profits. Plaintiff

worked under that agreement until October 1953, when he quit his employment. Defendants were not pleased by his sudden termination of the employment and refused to pay the $20 per unit on the 71 houses completed prior to July 1, 1953.

Plaintiff's evidence is that the $20 was payable when each unit was completed. Defendants' answer admits that the 287 units were completed on or before July 1, 1953.

A defendant testified that the oral contract was that the foremen were to be paid $20 per unit at Christmas time provided they had done their work efficiently and in cooperation with the others. No complaint is made on that score.

Defendants' records, however, show that the foremen, including plaintiff, were paid part or all of the $20 per unit on request from time to time throughout the year.

This action was not commenced until March 1955, so that in any event the plaintiff's payment claimed was due and payable when this action was brought. A defendant, in explaining his refusal to pay the amount claimed, said that payment was refused because plaintiff had not shown "due consideration" for the job and that it was a part of the "intent" of the plan to have the job run smoothly through the year and "not quit in the middle of any job."

Obviously that "intent" was not expressed in the contract terms but is an afterthought. Just as obviously plaintiff did not quit in the middle of any job he was doing under the wage contract here involved.

The judgment of the trial court is amply sustained by the evidence.

Plaintiff claims an attorney's fee should be allowed here under the provisions of section 25-1801, R. S. Supp., 1955. He claims he pleaded 71 causes of action in the amount of $20 each. Obviously he did not. The request is denied.

AFFIRMED.

RAYMOND D. HAGGARD, APPELLEE, V. RALPH E. MISKO ET AL., APPELLEES, IMPLEADED WITH ROBERT KEEFE ET AL., APPELLANTS.
83 N. W. 2d 483

Filed June 7, 1957. No. 34149.

1. **Elections.** A statute conferring a right to vote upon absentee and disabled voters will be strictly construed, its provisions being mandatory as to a voter desiring to exercise such right.
2. ———. Statutory provisions regulating the conduct of elections are directory only when they are not essential to a fair election and they are not made mandatory by the statute itself.
3. ———. Irregularities by a city clerk in not keeping a poll book of disabled voters in the form provided by law does not deprive an elector of the right to have his vote counted where he has complied with all mandatory provisions of the statute applicable to him.
4. ———. The posting of a notice of the convening of a canvassing board is directory, and the failure to do so does not invalidate the votes of absentee and disabled voters.
5. ———. Irregularities of a canvassing board in conducting a canvass of votes cast at an election will not invalidate the votes of electors otherwise valid where there is no fraud and proper effect can be given to them.

APPEAL from the district court for York County: H. EMERSON KOKJER, JUDGE. *Reversed and remanded with directions.*

Roderick R. Perry and *Herman Ginsburg,* for appellants.

Gerald F. Beaver, for appellee Haggard.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an election contest to determine the validity of a bond election held by the school district of the City of York, Nebraska. The trial court found that there were 14 illegal ballots cast, that one mail ballot cast was not in accordance with law, and that the remaining 38 absentee and disabled voters' ballots were

invalid and should be rejected because of irregularities in the conduct of the election. These findings resulted in a decree to the effect that the bond election failed to receive the required vote and that the proposed bond issue should be declared lost. Three contestees and one elector whose ballot was rejected have appealed.

On May 16, 1956, the school district held an election to secure authorization for the issuance of bonds in the amount of $575,000 for the purpose of purchasing a site and constructing and furnishing additional school buildings for the district, and to authorize a special levy of taxes for the payment of such bonds. The board of education of the district, sitting as an election canvassing board, found and declared that 1,603 ballots had been cast for the proposition and that 1,305 ballots had been cast against it. The board thereupon declared the election had carried by 55 percent of the legal votes cast at the election, as required by section 10-702, R. R. S. 1943.

The appellee Haggard instituted a contest of the election under section 32-1001, R. R. S. 1943, the statutory grounds therein relied upon being as follows: "(5) when illegal votes have been received or legal votes rejected at the polls sufficient to change the result; (6) for any error in any board of canvassers in counting the votes, or in declaring the result of the election if the error would change the result; * * *."

The finding of the trial court that there were 14 illegal votes cast, 6 of which were cast for and 8 against the bond issue, is not questioned by this appeal. This has the effect of reducing the number of votes admittedly legal which were cast for the bond issue by 6 and those cast against it by 8. In view of the fact that the one mail ballot cast cannot change the result of the election, we shall not review the trial court's finding that it should be rejected. The only issue remaining is whether or not the trial court properly rejected the remaining 38 absentee and disabled voters' ballots. The record shows that of these 38 ballots, 32 voted for the

bond issue and 6 voted against it. If the absentee and disabled voters' ballots were properly rejected, the election failed of the required majority. If such votes were entitled to be counted, the election carried by the required majority.

Of the remaining 38 absentee and disabled voters' ballots, 11 were cast by disabled voters and 27 by voters who appeared in person and cast their ballots in the presence of the city clerk. As to the 11 disabled voters, the record shows that each disabled voter appointed an agent who appeared before the city clerk and procured an application, the identification envelope, and a ballot. The agent took the ballot to the disabled voter's home where it was voted in the presence of the agent without his being able to see how it was marked. The ballot was placed in the envelope, sealed, signed, and notorized. The ballot was then returned to the city clerk by the agent. All disabled voters' ballots were handled in substantially the same manner. No objection appears to have been made by the contestant to this manner of handling. The 27 absentee ballots cast in person were handled in the following manner: The voter appeared personally at the office of the city clerk, made application for an absentee ballot, voted in the presence of the city clerk, caused the ballot to be sealed in the proper envelope, and signed it and swore to it before the city clerk. Contestant does not appear to object to this method of handling.

The primary question is whether or not the failure of the city clerk and the school board to comply with statutory requirements in the handling of the 38 absentee and disabled voters' ballots has the effect of invalidating such ballots. It is contended that the city clerk failed to enter the names of absentee and disabled voters, together with their post-office addresses, residences, and voting precincts, in a poll book as required by section 32-807, R. R. S. 1943. It is contended also that the city clerk failed to give the 48-hour notice of the time

the school board would sit as a canvassing board to canvass absentee and disabled voters' ballots, as required by section 32-814, R. R. S. 1943. Many similar contentions are advanced as to claimed irregularities in conduct of the city clerk and the school board in the canvassing of the ballots, the certification of poll books, the custody of ballots cast, and the like. All are controlled by the same rules of law and will be considered together. We shall not determine whether or not all the statutes cited apply to a school bond election. We shall assume solely for the purpose of this case that they do.

The evidence shows that the city clerk made up a list of all absentee and disabled voters and gave written notice thereof to each election board. There is no contention that any fraud existed. It is not disputed that the city clerk failed to post the 48-hour notice required by section 32-814, R. R. S. 1943; nor is it disputed that the school board met on the evening of election day and counted the absentee and disabled voters' ballots. The evidence shows further that the school board convened on May 21, 1956, and canvassed the vote without a notice having been posted.

The right of absentee and disabled voters to cast their ballots at an election is purely statutory. A statute conferring such a right will be strictly construed and its provisions are mandatory as to a voter desiring to exercise such right. McMaster v. Wilkinson, 145 Neb. 39, 15 N. W. 2d 348, 155 A. L. R. 667; Miller v. Mersch, 152 Neb. 746, 42 N. W. 2d 652.

The provisions of statutes which affect the mode and manner of conducting the details of an election are directory only and not mandatory, and a departure from the prescribed method will not vitiate the ballot of a voter who has complied with the mandatory provisions of the statute applicable to him. State ex rel. School Dist. No. 2 v. Marsh, 108 Neb. 749, 189 N. W. 283; Wheelock v. Haney, 138 Neb. 547, 293 N. W. 418; McMaster v. Wilkinson, *supra*.

In order to give effect to the will of the majority and to avoid the disfranchising of legal voters, the courts have uniformly held statutory provisions regulating the conduct of elections to be formal and directory when they are not essential to a fair election, unless such provisions are made mandatory by the statute itself. The rules provided by statute for the conduct of elections are designed to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal votes, and to ascertain the results with certainty. State ex rel. Waggoner v. Russell, 34 Neb. 116, 51 N. W. 465, 15 L. R. A. 740, 33 Am. S. R. 625. It is not the policy of the law to disfranchise voters who have complied with the mandatory provisions of the law because of the mistakes, negligence, or misconduct of election officials. It is firmly established in our law that votes will not be rejected where election officials have failed to comply with the directory provisions of the election laws, if there is no fraud. The rule is summarized in 18 Am. Jur., Elections, § 225, p. 332, as follows: "It may, therefore, be stated as a general rule that if ballots are cast by voters who are, at the time, qualified to cast them and who have done all on their part that the law requires of voters to make their voting effective, an erroneous or even unlawful handling of the ballots by the election officers charged with such responsibility will not be held to disfranchise such voters by throwing out their votes on account of erroneous procedure had solely by the election officers, provided the votes are legal votes in their inception and are still capable of being given proper effect as such."

The 38 absentee and disabled voters whose ballots are here questioned were legal voters of the district. They have complied with the mandatory provisions of the statute in the exercise of their right to vote. They have committed no fraud nor any other wrongful act. Their right to vote under such circumstances cannot be defeated by the mistakes of election officials, nor by the

latters' disregard for the directory provisions of the election laws.

The record shows that at least 32 of the absentee and disabled voters' ballots were cast in favor of the bond issue and that no more than 6 ballots were cast against it. We conclude, therefore, that, after deducting the 14 invalid ballots and the one rejected vote by mail, the final result is 1,596 votes for and 1,297 votes against the bond issue. Since the vote for the bonds was in excess of 55 percent of the total vote cast at the election, the proposition carried in the manner required by law.

The trial court was in error in not so finding. The judgment of the district court is reversed and the cause remanded with directions to enter a judgment finding that the election was valid and that the bond issue carried by the majority vote required by law.

REVERSED AND REMANDED WITH DIRECTIONS.

NATIONAL REEFER SERVICE, INC., APPELLANT, V. SOL FELMAN, APPELLEE.
83 N. W. 2d 547

Filed June 7, 1957. No. 34157.

1. **Attachment.** An attachment affidavit setting forth the nature of the plaintiff's claim, that the claim is just, the amount which the affiant believes the plaintiff ought to recover, and the existence of one or more statutory grounds for the writ in the language of the statute is sufficient as a basis for the issuance of the writ.
2. ———. Where an attachment is predicated on two or more claims one or more of which does not properly provide the basis for attachment, the defendant on motion is entitled to have the entire attachment dissolved.
3. ———. In a case where the facts stated in an affidavit for attachment are denied on a motion to dissolve, the burden is cast upon the plaintiff to sustain the charges contained in the affidavit by proof.
4. ———. Affidavits used at the hearing of a motion to dissolve an attachment will not be considered in this court on appeal

unless preserved in a bill of exceptions.

5. ———. An attachment may not be dissolved on the ground alone that the debt is not due at the time the action is started. If the plaintiff is entitled to prosecute the case to final judgment, he is entitled to the security afforded by the attachment in the absence of any other ground for dissolution.
6. **Indemnity.** An indemnitee may proceed against his indemnitor by an action ex contractu on the contract of indemnity.
7. **Attachment.** An action for damages for the breach of the terms of an agreement is an action on the contract within the meaning of section 25-1001, R. R. S. 1943.
8. ———. The merits of a cause of action will not be adjudicated on a motion to dissolve an attachment.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Reversed.*

Fitzgerald, Hamer, Brown & Leahy, Daniel J. Monen, Jr., and *James L. Koley,* for appellant.

Viren, Emmert, Hilmes & Gunderson and *Frank L. Morrison,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action by National Reefer Service, Inc., plaintiff and appellant, against Sol Felman, defendant and appellee, to recover from the defendant separate amounts of $593.49 and $600, the total of which is $1,193.49, claimed to be due plaintiff pursuant to the terms of a brokerage agreement entered into on June 22, 1956. After the petition was filed the plaintiff filed an affidavit for attachment. The ground for attachment was that the defendant was a nonresident of the State of Nebraska. An order of attachment was issued which was levied on an International tractor belonging to the defendant.

After the order was levied the defendant filed a motion to dissolve the attachment. After hearing the attachment was dissolved. From the order dissolving the attachment the plaintiff has appealed. Two assignments

of error are presented as grounds for reversal. The first is that the order dissolving the attachment was not sustained by sufficient evidence. The second is that the order was contrary to law.

The grounds for dissolution of the attachment set forth in the motion are numerous. By the motion however it is not contended that the defendant is not a nonresident of the State of Nebraska. It is tacitly admitted that he is a nonresident.

The first ground is that the affidavit filed by the plaintiff was not sufficient to sustain the attachment. It is assumed that by the specification the defendant meant to say that no ground for attachment was sufficiently alleged.

The contention may not be sustained. The determination of whether or not an affidavit for attachment is sufficient depends upon whether or not there has been a compliance with the requirements of section 25-1002, R. R. S. 1943. The requirements are that it shall contain the nature of the claim, a declaration that the claim is just, the amount of the claim, and a declaration of the existence of some one of the grounds of attachment enumerated in section 25-1001, R. R. S. 1943. The affidavit fully complied with all of these requirements. One of the grounds enumerated in section 25-1001, R. R. S. 1943, is nonresidence of the defendant.

In McDonald v. Marquardt, 52 Neb. 820, 73 N. W. 288, it is said: "An attachment affidavit setting forth the nature of the plaintiff's claim, that it is just, the amount which the affiant believes plaintiff ought to recover, and the existence of one or more statutory grounds for the writ in the language of the Code of Civil Procedure is sufficient." See, also, Ellison v. Tallon, 2 Neb. 14; Tallon v. Ellison & Sons, 3 Neb. 63; Hilton v. Ross, 9 Neb. 406, 2 N. W. 862; Steele v. Dodd, 14 Neb. 496, 16 N. W. 909; Burnham v. Ramge, 47 Neb. 175, 66 N. W. 277.

The second ground is that the attachment was based

on two claims on at least one of which attachment could not be based. The substance of this contention is that one of the claims sounded in tort and that this being true it could not provide a basis or foundation for attachment. The rule which it is contended is applicable is that, where an attachment is predicated on two or more claims one or more of which does not properly provide the basis for attachment, the defendant becomes entitled to have the entire attachment dissolved.

The rule as such is one which is recognized by the decisions of this court. See, Mayer & Schurmann v. Zingre, 18 Neb. 458, 25 N. W. 727; Meyer v. Evans, 27 Neb. 367, 43 N. W. 109. The question therefore is that of whether or not this case falls within the purview of the rule.

As pointed out the ground for attachment is that the defendant is a nonresident of the State of Nebraska. Section 25-1001, R. R. S. 1943, contains the following provision: "An attachment shall not be granted on the ground that the defendant is * * * a nonresident of this state, for any claim other than a debt or demand arising upon contract, judgment or decree, unless the plaintiff shall have been a bona fide resident of this state for at least six months preceding the filing of the petition."

The plaintiff has not stated the length of its residence in this state, so reasonably the question to be considered is only that of whether or not the two claims are for debts or demands arising upon contract. There is no basis for consideration of whether or not they arise out of the judgment or decree.

The burden devolved upon the plaintiff to prove that the claims arose out of contract. The rule is as follows: "Where the facts stated in an affidavit for an attachment are denied on a motion to dissolve, the burden is cast upon the plaintiff to sustain his charges by proof." Geneva Nat. Bank v. Bailor, 48 Neb. 866, 67 N. W. 865. See, also, Steele v. Dodd, *supra;* Olds Wagon Co. v. Bene-

dict, 25 Neb. 372, 41 N. W. 254, on rehearing, 27 Neb. 344, 43 N. W. 108; Malcolm Savings Bank v. Cronin, on motion for rehearing, 80 Neb. 231, 116 N. W. 150.

The facts stated in the affidavit were denied by the motion to dissolve the attachment and it is clear, since there is a bill of exceptions, that a hearing was had on the motion pursuant to which the attachment was dissolved.

On the record which this court is permitted to examine on review it must be said that the plaintiff has sustained its burden. This is so since the bill of exceptions contains only evidence adduced by plaintiff and none by the defendant. The hearing was on affidavits. Three affidavits were adduced in evidence on behalf of the plaintiff all of which appear in the bill of exceptions. None on behalf of the defendant so appear. The three taken alone sustain the contention of the plaintiff.

It is true that affidavits on behalf of defendant were submitted in the case to the district court but they may avail nothing in this court. In Olds Wagon Co. v. Benedict, *supra,* it was said: "Affidavits used at the hearing of a motion to dissolve an attachment will not be considered in this court on error, unless preserved by a bill of exceptions." See, also, Tessier v. Crowley, 16 Neb. 369, 20 N. W. 264, on rehearing, 17 Neb. 207, 22 N. W. 422. Therefore the second ground of the motion must in this court be resolved against the defendant.

The third ground advanced for dissolution of the attachment must be resolved against the defendant for the same reason as the second since it also depends upon the sufficiency of the record in support of the right to attachment.

By the fourth ground in substance the theory is advanced that attachment will not lie unless an obligation is due. As authority for this theory the case of Dayton Spice-Mills Co. v. Sloan, 49 Neb. 622, 68 N. W. 1040, is cited. The case does not sustain the theory. The ques-

tion was not considered or decided. In that case an attachment was dissolved. The ground of the action of the court dissolving the attachment does not clearly appear. The court dismissed the action because the claim was not due, but it did not dissolve the attachment for that reason.

The true rule is that an attachment may not be dissolved on the ground alone that the debt is not due at the time the action is started. If the plaintiff is entitled to prosecute the case to final judgment, he is entitled to the security afforded by the attachment in the absence of any other ground for dissolution. See, Reed v. Maben, 21 Neb. 696, 33 N. W. 252; Caulfield v. Bittenger, 37 Neb. 542, 56 N. W. 302. The theory therefore is without merit.

Exhibit A attached to the petition, which is the contract out of which the action and the attachment flow, and the violation of its provisions by the defendant provide the basis of the action and of the attachment. By the fifth ground for dissolution of the attachment the defendant contends substantially that at least one of the claims does not flow from the exhibit.

The plaintiff claims nothing except from rights and obligations declared by and incidental to the exhibit. An examination of the exhibit indicates that the claims may reasonably flow therefrom. The exhibit as to one claim imposes strictly contractual obligations. This phase requires no further consideration.

As to the other it appears to be in the nature of an indemnity agreement. The general rule under such circumstances, as stated in 42 C. J. S., Indemnity, § 28, p. 609, is: "An indemnitee may proceed against his indemnitor by an action ex contractu, on the contract or bond of indemnity, * * *; or, where he seeks to recover for damages paid for injuries caused by the negligent or wrongful acts, he may proceed by action ex delicto, * * *."

The apparent position of this court conforms to this

statement of principle. This court has said that an action for damages for breach of warranty is ex contractu. In Cheney v. Straube, 35 Neb. 521, 53 N. W. 479, it was said: "The action of covenant was in form and substance ex contractu, and in action under the code by a convenantee for damage on account of the breach of a covenant of warranty, after eviction under a paramount title, is a debt arising under a contract, which may be recovered by attachment."

The conclusion reached is that the plaintiff chose its remedial action as it had the right to do, and therefore the fifth point of the motion is without merit.

The sixth and last stated ground for dissolution of the attachment was that the value of the property attached was greatly in excess of any possible recovery in the action. No authority has been cited the effect of which is to say that the fact that more property has been attached than an amount sufficient to satisfy the recovery in an action shall be ground for dissolving an attachment.

Also on another ground this contention may not be sustained. The determination of what may be recovered is ascertainable of course by a trial on the merits in the action. The question of the right of recovery and the amount thereof is not a matter for consideration on a motion to dissolve an attachment. This court said in McDonald v. Marquardt, *supra*: "The merits of a cause will not be adjudicated on a motion to dissolve an attachment." See, also, Olmstead v. Rivers, 9 Neb. 234, 2 N. W. 366.

The conclusion, in the light of the observations herein, is that the order dissolving the attachment and exonerating the redelivery bond was erroneous. It is accordingly reversed.

REVERSED.

JAMES ELLIOTT, APPELLANT, V. WILLIAM BRANDT, JR., APPELLEE.

83 N. W. 2d 767

Filed June 14, 1957. No. 34117.

1. Assault and Battery. Evidence of previous threats to commit an assault and battery are admissible on a trial involving an assault or assault and battery, provided the threats were made in such a manner and at such a time as to have a direct bearing on the assault in question.
2. ———. In an action for assault and battery it is not error to allow plaintiff to be cross-examined fully in regard to his former relations with the defendant.
3. Evidence. Where a plaintiff is permitted to give evidence on a specific issue, defendant's evidence to the contrary is admissible on the same issue.
4. Trial. The instruction set out in the opinion taken together with other instructions given by the trial court states the law correctly.

APPEAL from the district court for Cass County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Francis M. Casey, Healey, Davies, Wilson & Barlow, and *Kenneth Cobb,* for appellant.

Smith & Lebens, Emory P. Burnett, and *Van Pelt, Marti & O'Gara,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action for damages brought in the district court for Cass County by James Elliott, plaintiff, for injuries alleged to have been sustained by him as the result of an assault and battery committed upon his body by William Brandt, Jr., defendant. The case was tried to a jury resulting in a verdict for the defendant. The plaintiff filed a motion for new trial. From the order overruling the motion for new trial, the plaintiff appealed.

The plaintiff's petition alleged in substance that on

or about the evening of September 18, 1953, the defendant unlawfully and without sufficient provocation committed assault and battery upon the body and person of the plaintiff resulting in injuries to him.

The defendant's answer alleged in substance that the plaintiff, without provocation, did unlawfully assault and willfully and maliciously strike and wound the defendant with his fist, and unlawfully threatened the defendant with serious injury with a club; that whatever injuries the plaintiff received were by reason of necessary defense made by the defendant while he was lawfully defending himself from said assault and while he was lawfully upon his own property; that in November 1949, in the city of Plattsmouth near the public library in said city, the plaintiff, without provocation unlawfully, willfully, and maliciously struck the defendant in the face and threatened to beat the defendant; and that on other occasions the plaintiff, without provocation, abused the defendant and attempted to provoke an assault, which assault and threats had all been made prior to September 18, 1953, and which had been communicated to the defendant. The answer further alleged that at the time of the unlawful assaults and threats made by the plaintiff on September 18, 1953, the defendant used only such force in repelling the assaults as he believed to be necessary to resist the same and for his protection and defense. The answer denied all other allegations pleaded in the plaintiff's petition.

The plaintiff's reply to the defendant's answer was a general denial.

For convenience we will refer to the parties as they were designated in the district court and on occasions to the plaintiff, James Elliott, as Elliott, and the defendant, William Brandt, Jr., as Brandt.

The record discloses that Elliott lives on a farm 5 miles northeast of Avoca and has resided there since 1942. His farm is located north across the road from

the farm of Brandt. There is a county road extending east and west between these farms. The east-west county road was newly graded but not rocked at the time of the fight on September 18, 1953, and the fences on both sides of the road were down. Brandt has lived on his present farm since 1944. At the time of the fight Elliott was 59 years of age, was nearly 6 feet tall, and weighed 210 pounds. Brandt weighed 180 pounds, was 5 feet 8 inches tall, and was 40 years of age.

About 6 p.m., Elliott drove west on the county road which divides his farm and the Brandt farm for the purpose of putting in some fence. He stopped his truck 30 rods west of his driveway where the fence was out. This was at a point near a fill and culvert that runs into the Brandt land. The road had been freshly graded, there was but a single track, and the surface was of soft dirt. He also wanted to inquire of Brandt about putting rock on the road. He got out of the truck close to the center of the fill about where the culvert that leads into Brandt's farm was located. Brandt was putting a wire on the second brace post from the east. He talked to Brandt about putting rock on the road. They both knew it would cost $150 to do so. Brandt told him that he was "hard up," did not have any money, and was not interested in putting rock on the road except from his mail box to the highway which did not include the county road in question. Elliott testified that about that time Brandt came out into the road after him and acted as though he was going to strike him. Elliott did not know if Brandt hit at him. He testified that Brandt turned around and went back to the post upon which he was working; that he came back and "hit me or something"; and that then the fight really started. Elliott testified that the next he remembered he was down on the ground but still on the culvert. Brandt was trying to throw dirt in his face and eyes and trying to twist Elliott's arm behind him.

The next thing Elliott remembered was that he was back in the middle of the road behind the truck. His upper plate was broken and he was bleeding at the mouth. He took his plate out and put it in his pocket, and Brandt started at him again. The truck had gone down the hill a distance of about 30 feet and stopped. Elliott was having difficulty seeing at that time as he had a cut across his eye, on the side of his head, and across one of his ears, and was bleeding badly. The truck was stuck in the loose dirt. Brandt was unable to back it up. He offered to get the tractor to pull the truck out. Elliott got in the truck and started the motor. Brandt got hold of him around the neck and tried to pull him out of the truck. Brandt finally let loose and told Elliott to get over, that he would drive. Brandt drove the truck to his home over Elliott's protest. A doctor was called to attend him. Elliott also testified that while he was at Brandt's home, Brandt's wife accused him of lying; and Brandt took hold of him, shook him, and he fell to the ground.

The evidence adduced in behalf of Brandt was to the effect that before September 18, 1953, Elliott threatened and attacked him in front of the library at Plattsmouth in November 1949. There was a meeting at the library with reference to selecting a committee for redistricting schools. After the meeting, Brandt came out of the basement of the library and Elliott was standing on the sidewalk. Brandt was talking to a Mr. Althouse who was inquiring about the difficulty in Brandt's school district. At that time Elliott struck him in the face. Brandt said: "Well, * * * if you feel better, why, go ahead and hit me again, if you want to." Elliott struck Brandt again. Brandt told Elliott to "go ahead and get it all out of your system," and started down the street. Elliott said: "No, * * * you goddam little runt, * * * we are going to catch you at home sometime and we are going to beat all the hell out of you then." At that time Brandt was walking toward

his car. On September 18, 1953, Brandt was building a fence on the north side of his farm. About 6 p.m., he saw Elliott coming from the east down to where he was working. Elliott stopped his truck just north of where he was, with the back of the truck about even with the west end of the culvert. There was a ditch approximately 3 to 3½ feet deep on both sides of the culvert. Elliott got out of the truck. At that time Brandt was working on the south side of two fence posts on his own land. Elliott came across the fill, and when he got within 6 or 7 feet of Brandt he said: "I see you are getting your fence back in, * * *." Brandt said "Yes." Then something was said about fixing a hole down at the bridge. Then Elliott told Brandt the road was ready to rock, and asked him what he was going to do about it. Brandt said he was "hard up," didn't have much money, and asked Elliott which road he meant. Elliott pointed out the county road to him. Brandt told Elliott that he was interested in paying for putting rock on the road only from his driveway to the highway. Elliott came closer to where Brandt was working on the fence and said: "That's just the kind of a goddamn son-of-a-bitch you always have been, * * * the only one you ever think of is Bill Brandt." Brandt told him that was not true, and he should take it back. Elliott said he would not take it back. Elliott told Brandt to come out where he was and he would show him what was going to happen to him. Brandt told Elliott to go home and mind his own business, that he was tending to his. Elliott told Brandt he was out in the road and did not have to go home. Elliott then struck Brandt in the face and started around the fence after him. They met and exchanged three or four blows apiece. Then Elliott left and went back across the fill. Brandt believed the fight was over and Elliott was going back home. Elliott walked rapidly across the fill, reached into the back of his truck, and got out two boards. As he started back across the

fill, he dropped one of them. He had the other in his right hand, raised it, and struck at Brandt. As he did so, Brandt grabbed the board, jerked it out of Elliott's hand, and threw it down beside the fence. Brandt told Elliott if they were going to have to fight "let's fight it fair." Then Elliott made a dive for Brandt's wagon which was near where he was working and where he had the tools and equipment. Brandt grabbed Elliott around the neck and held onto the brace fence post until Elliott overpowered him. Elliott pushed Brandt into the ditch, and while he was in the ditch threw big chunks of dirt 7 or 8 inches in diameter at him. One chunk of dirt hit Brandt and peeled the skin off one side of his face. Elliott left and was trying to get back to his truck. They engaged in more fighting. Brandt struck Elliott in the face, trying to keep him from getting to the back end of his truck. One time Elliott asked Brandt to stop and rest. Brandt said "let's stop the thing altogether," but Elliott kept hitting Brandt. Shortly after that Elliott said he had broken his upper plate. The fight stopped until Elliott had removed his denture and put it in his pocket. The fight continued with Elliott trying to kick Brandt in the groin. Brandt struck Elliott in the jaw and he went down on his hands and knees. Brandt said to Elliott: "Let's stop," but Elliott got up and "just bulled" into Brandt, shoved him against the back end of the truck, and overpowered him. There were two hammers in the back of the truck which Brandt thought Elliott was trying to reach. During the time Brandt was trying to get his footing, he was pushed against the back of the truck causing it to roll down the road on the soft ground where it stopped near the ditch. Elliott said: "Well, I am just so sick, * * * I've just got to sit down and rest." Brandt said that suited him fine, he wanted to quit too. That was the end of the fight. Brandt further testified that Elliott struck the first blow, hitting him in the face; that neither of them were knocked out or knocked down

during the fight; and that the fight lasted about 15 to 20 minutes, until the truck rolled down the hill. Brandt further testified that Elliott did not hit him with a club, but attempted to do so; that during the fight he had in mind and believed that Elliott was attempting to carry out the threat he made in November 1949; and that he was afraid of Elliott and afraid for his life.

The plaintiff's wife testified by deposition in his behalf as a part of the plaintiff's case-in-chief. She testified that prior to September 18, 1953, the time of the fight in question, her husband had difficulty with Brandt about the road. Her husband claimed that Brandt's fence was located beyond his land and on the road. It appears that this trouble occurred some years prior to September 18, 1953. She further testified about her husband and Brandt having difficulty over school matters.

The sheriff of Cass County testified that after the attack made on Brandt by Elliott near the public library in Plattsmouth, Brandt came to see him and they discussed the attack. Brandt told the sheriff he would go home and talk to his wife about the matter and contact the sheriff later. Two days thereafter Brandt called the sheriff and informed him that the matter had not been settled, and requested the sheriff to come to his place. The sheriff went to Elliott's house and got Elliott, then drove to Brandt's home where they had a discussion about the occurrence at the library. Elliott denied that he had struck Brandt or threatened him. Brandt then told the sheriff again about the blows and about fearing Elliott, and there was a discussion about having Elliott put under a peace bond. The next day Elliott and his attorney, the county attorney, and Brandt were all present at the sheriff's office. At that time Elliott admitted striking Brandt twice when he was in front of the library and threatening him near the library. Brandt then agreed not to file charges against Elliott or put

him under peace bond. There is some testimony that plaintiff's counsel, as well as the county attorney and the sheriff, endeavored to bring Elliott and Brandt together, and after the admissions were made by Elliott, Brandt did shake hands with him, but thereafter neither Brandt nor Elliott had anything to do with each other.

The plaintiff's assignments of error necessary for a determination of this appeal may be stated as follows: (1) The trial court erred in submitting to the jury the issue of the plaintiff's violent disposition when the same was not pleaded, nor was any evidence introduced to support this issue; (2) the trial court erred in allowing the introduction in evidence of a threat of physical violence of the plaintiff to the defendant when the same was made at an unreasonable length of time before this incident; and (3) the trial court erred in permitting the defendant to testify over objection that he used no more force than was necessary to defend himself.

Before determining the plaintiff's assignments of error, we consider the following.

The defendant contends that the failure of the plaintiff to predicate error on the trial court overruling his motion for new trial presents nothing on which a reversal could be based. The defendant's contention is that the plaintiff has abandoned the appeal from such order and as a consequence there are no assignments of error to be considered by this court.

The function of a motion for new trial is to call the trial court's attention to alleged errors committed during the course of the trial. The trial court considers the separate assignments of error contained in the motion for new trial, which are generally in accordance with the statute, and determines whether or not, in its judgment, error was committed, and rules accordingly. From this final order an appeal may be taken to this court. The party appealing sets forth in appellant's brief the assignments of error alleged to have been committed by the trial court during the course of the

trial. This court reviews such assignments of error to determine whether they, or any of them, are meritorious and require a reversal of the trial court's judgment. There is no requirement in this jurisdiction that the party appealing predicate error on the overruling of the motion for new trial. The defendant's contention is without merit.

We consider the plaintiff's first two assignments of error together. In this connection, the plaintiff makes reference to the defendant's answer dealing with the allegation as to the assault made on the defendant by the plaintiff in November 1949. The plaintiff asserts that the evidence shows that from and after November 1949, the plaintiff and defendant were still neighbors, lived across the road from each other and saw each other frequently, and no blows were exchanged between them from the time of the incident in 1949 up to the time of the fight in 1953; and that on several occasions the plaintiff and defendant would be working in their respective fields alone, and there were no threats, blows, or threats of violence during this period of time. There is a conflict in the evidence as to the assertion made by the plaintiff as will appear later in the opinion.

The plaintiff also directs attention to instruction No. 11 given by the trial court as being prejudicially erroneous for the reason that it raises two issues, the violent disposition of the plaintiff toward the defendant and the general violent disposition of the plaintiff, which were not raised in the pleadings; that there is no evidence of the general character for violence of the plaintiff, or any evidence in regard to the plaintiff's character; and that in considering the conduct of the parties toward each other since the incident in 1949, the plaintiff contends that one specific act of violence is not sufficient to sustain an instruction on the general violent disposition of the plaintiff.

Instruction No. 11 reads as follows: "In determining the question of the reasonableness of the action or actions

of the defendant in the premises, you should take into consideration the excitement of the occasion, if any such is proved by the evidence, the previous violent conduct of the plaintiff towards the defendant, if any such is proved, *the information of the defendant touching the violent disposition of the plaintiff,* if any such is proved, and whether the defendant in good faith believed and acted upon such information, and, from a full, fair and candid consideration of all the evidence and facts and circumstances proved on the trial, determine whether the defendant acted as a reasonable man would under the same circumstances." (Emphasis supplied.)

The plaintiff cites Trousil v. Bayer, 85 Neb. 431, 123 N. W. 445, as follows: "Defendant also complains of the refusal of the court to admit testimony as to specific acts of the plaintiff for the purpose of proving that he was of a quarrelsome and contentious disposition. But proof of this nature must be as to general reputation, and not as to specific acts. Golder v. Lund, 50 Neb. 867."

The plaintiff also cites Carleton v. State, 43 Neb. 373, 61 N. W. 699. This was a first degree murder case. The general rule was stated, in substance, as follows: When character is in issue the proof must be of general reputation, not of specific acts, and not by proving the opinion of the witness based on his own observation as to the general character of the person in question. See, also, Daggs v. St. Louis-San Francisco Ry. Co. (Mo. App.), 51 S. W. 2d 164; Cummins v. Crawford, 88 Ill. 312, 30 Am. R. 558.

We are not in accord with the plaintiff's contention insofar as the instant case is concerned. The pleadings in the instant case put in issue the question as to who started the fight. In the light of the pleadings, any competent evidence offered by the defendant is admissible to prove his claim that the plaintiff started the fight and that the defendant acted only in self-defense. There were no witnesses to this fight. We believe, under the cir-

cumstances, the authorities favor the right of the defendant to offer evidence of previous threats and acts of aggression against him by the plaintiff to prove that the plaintiff was the aggressor.

The defendant testified that after the assault made on him by the plaintiff in Plattsmouth in 1949, the plaintiff's conduct toward him was of a disagreeable and hostile nature, and that he was afraid of the plaintiff, that is, afraid that he might carry out the threat that he made at that time, and that the plaintiff, while both were working in their respective fields, showed a disposition to start trouble during the intervening years up to the time of the assault.

As stated in 4 Am. Jur., Assault and Battery, § 153, p. 198: "Evidence of previous threats to commit an assault and battery are admissible on a trial involving an assault or assault and battery, provided the threats were made in such a manner and at such a time as to have a direct bearing on the assault in question. * * *

"Where the defendant pleads self-defense, he may show that the prosecutor had made threats against him, for the purpose of proving that he committed the assault and battery under the reasonable belief that unless he acted promptly the prosecutor would inflict grievous injury on him. But before a person is justified in making an attack or inflicting bodily harm upon a person who has made threats against him, however well grounded his apprehension may be, there must be some overt act from which may be reasonably inferred an intention to carry into effect his threats of personal violence. Hence, the only effect that previous remote threats can have is to give character to an overt act on the part of the person who made the threats and to justify the other in acting more promptly in self-defense than would have been permitted had no threats been made."

In Galbraith v. Fleming, 60 Mich. 403, 27 N. W. 581, the court said: "He (defendant) had a right to place before the jury the character of the plaintiff as he knew

it to be; to show him to be a high-tempered, quarrelsome, fighting man, whose anger and spite towards defendant had before led him to do exactly what defendant then feared he was about to do. The defendant had a right to act upon his honest belief, and upon the circumstances as they appeared to him. His actions were to be judged from the transaction as it appeared to him, and the jury could only determine this by knowing of the plaintiff what the defendant knew as to his disposition and temper towards him. * * * The jury were instructed that this evidence could not be used in mitigation of damages, but might be considered in determining whether the plaintiff was the attacking party, or whether the defendant believed that he was in danger of an attack from the plaintiff."

In Peterson v. Toner, 80 Mich. 350, 45 N. W. 346, it was held that for the purpose of showing plaintiff's malice toward defendant and in making an assault on the defendant, the defendant may introduce evidence of threats made against him by the plaintiff 3 or 4 years before the assault. It was apparent in this case that the plaintiff and defendant had had difficulty on different occasions running back over a period of 3 years and more. As to the former acts, the court said that the record offered two classes of proof on the subject. Evidence was offered to show by a witness the circumstances of a difficulty that occurred between the parties 3 years prior to the assault. This evidence was excluded. The court said that the circumstance inquired about was not more remote than had been allowed by the court, citing cases.

In Lambrecht v. Schreyer, 129 Minn. 271, 152 N. W. 645, L. R. A. 1915E 812, it was said: "The court received in evidence threats of violence made by defendant toward plaintiff two years and four months before the occurrence out of which this cause of action arose. Such evidence was admissible. The lapse of time was such that the probative force of the testimony may have

been little, but this goes to the weight of the testimony, not to its admissibility. State v. Hoyt, 46 Conn. 330; Keener v. State, 18 Ga. 194, 63 Am. Dec. 269; Commonwealth v. Quinn, 150 Mass. 401, 23 N. E. 54; Peterson v. Toner, 80 Mich. 350, 45 N. W. 346." See, also, Marshall v. Glover, 190 Ky. 113, 226 S. W. 398.

Instruction No. 11 presented to the jury issues solely concerned with matters within the actual knowledge of the defendant, that is, the previous violent conduct of the plaintiff toward the defendant and the information of the defendant touching the violent disposition of the plaintiff, and relates to previous conduct between the plaintiff and defendant and their relationship with each other, upon which there is a great amount of testimony.

The evidence offered by the defendant did not attempt to prove the general character of the plaintiff. What the defendant endeavored to prove was the plaintiff's violent conduct toward him and the continuing exhibition of a violent disposition toward him. This evidence was for the purpose of establishing the plaintiff as the aggressor in the fight in which the plaintiff received his injuries, and also to establish the defendant's state of mind, to disclose that he had good cause to be apprehensive of the plaintiff, and the force used by him to defend himself.

In McClure v. Shelton, 29 Neb. 370, 45 N. W. 689, the action was one of assault. The defendant's answer was a plea of justification. The assault occurred in 1887. In 1886, the plaintiff and defendant had an altercation in which the court was led to infer that the plaintiff was the aggressor. The court stated that this difficulty seemed to have been the source of the quarrel in the case at bar. Instruction No. 11 given by the trial court in the instant case is taken verbatim from McClure v. Shelton, *supra,* wherein it was approved. See, also, Miller v. Olander, 133 Neb. 762, 277 N. W. 72.

The plaintiff also contends that evidence of the specific act of assault and battery made upon the defendant

by the plaintiff in November 1949 and of the threat made by the plaintiff to the defendant was inadmissible. If prejudice could have resulted, it was cured when the plaintiff put the question of previous difficulties between himself and the defendant into evidence by the deposition of his deceased wife. We have heretofore related a part of this evidence. The trial court permitted this evidence to be introduced under the rule that when one party gives evidence on a specific issue, the opposing party's evidence to the contrary is admissible on the same issue. See, Falkinburg v. Prudential Ins. Co., 132 Neb. 831, 273 N. W. 478; Scott v. Prudential Ins. Co., 203 Minn. 547, 282 N. W. 467.

In Albertson v. Chicago, M., St. P. & P. R. R. Co., 242 Minn. 50, 64 N. W. 2d 175, 42 A. L. R. 2d 1044, it was held error to exclude defendant's testimony on an issue as to which plaintiff had introduced evidence. The court held: "Where a plaintiff is permitted to give evidence on a specific issue, defendant's evidence to the contrary is admissible on the same issue."

The assignments of error made by the plaintiff which are discussed above cannot be sustained.

This brings us to the plaintiff's contention that the trial court erred in permitting the defendant to testify to a conclusion, which invaded the province of the jury.

This is the question propounded to the defendant: "During this fight did you use any more force than you thought was necessary to defend yourself?" To which there was an objection as calling for a conclusion of the witness and invading the province of the jury, not a statement of fact. This objection was overruled. The answer was: "No, I did not."

One of the ultimate facts to be determined by the jury, when the defense in an assault and battery case is self-defense, is whether the defendant used more force than was reasonably necessary to defend himself. In the instant case the defendant was not asked whether he used more force than was necessary to defend him-

self or whether he used more force than was reasonably necessary. The question asked was whether the defendant used more force than he "thought" was necessary. The question was directed to the defendant's state of mind during the fight. The record discloses other statements made therein by the defendant that he tried to keep the plaintiff from doing him harm was all; that he struck the plaintiff so that he could not get the tools he was trying to get with which to beat the defendant; and that defendant was fighting to keep the plaintiff from hurting him, and when he quit, the defendant was glad to quit. Considering these statements, it is testimony to the effect that the defendant thought he was using only such force as was necessary to defend himself. These statements were brought out on cross-examination of the defendant. The record also discloses that the defendant, during the fight, wanted to stop it, but the plaintiff refused. When the plaintiff indicated that he wanted to stop the fight, the defendant agreed and then the fight was over. Some of these statements were made by the defendant before and some after the asking and answering of the single question heretofore referred to. In view of all of the evidence on this point, on the numerous times the defendant said indirectly that he thought he used no more force than was necessary to repel the plaintiff, we find no prejudicial error in permitting the defendant to testify as he did. It was for the jury to believe the defendant or disbelieve him, and to determine whether or not the defendant had used more force than was reasonably necessary to defend himself under the circumstances.

For the reasons given in this opinion the verdict of the jury and the judgment entered thereon by the court should be, and are hereby, affirmed.

AFFIRMED.

IN RE APPLICATION OF SCHAUB.
HARRY SCHAUB, APPELLEE, V. CITY OF SCOTTSBLUFF, APPELLANT.

83 N. W. 2d 775

Filed June 14, 1957. No. 34153.

1. **Pensions.** The right to a fireman's pension in this state is statutory and the Legislature has authority to attach any condition to the existence of the right it desires.
2. **Pensions: Municipal Corporations.** Section 35-203, R. R. S. 1943, contemplates a hearing before proper municipal authorities and a decision based upon evidence presented at the hearing as a condition to the right therein provided.
3. ———: ———. The requirement of that section that it be ascertained by proper municipal authorities within 12 months of the date of the accident that the disability of the fireman has become permanent is mandatory and a condition of the right of recovery of benefits after the expiration of the designated period.
4. **Pensions.** The Legislature intended the language "in case of partial disability of a fireman" as used in section 35-203, R. R. S. 1943, to describe and mean the identical condition that is expressed by the words "in case of temporary total disability of a fireman" as contained in section 35-211, R. R. S. 1943.
5. ———. A fireman is permanently and totally disabled under the Firemen's Pension Act when the disability from which he suffers renders him permanently unable to obtain, hold, or do any substantial amount of remunerative work, either in his previous occupation or in any other established and recognized field of employment for which he is fitted.
6. ———. Total disability contemplates the loss of earning power and in measuring such loss consideration will be given to the ability to earn wages, eligibility to procure employment generally, ability to hold a job obtained, and the capacity to perform the tasks of the work in which a person is engaged.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Reversed and remanded with directions.*

Loren G. Olsson, for appellant.

Wright, Simmons & Harris, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

The subject of this litigation is a claim of appellee for benefits provided by the Firemen's Pension Act from the city of Scottsbluff. It is a city of the first class without a home rule charter. It has a paid fire department but does not have a board of fire and police commissioners. Appellee submitted to the city council of appellant a written statement which he asked should be considered as a petition. It contains the following:

Appellee was, on September 11, 1953, a fireman on the paid fire department of the appellant and has continued in that capacity since that date. He received an injury on that date while in the performance of his duties as a fireman. The injury did not result in total temporary disability of appellee until April 4, 1954, when surgery was performed because of it. Appellee was totally temporarily disabled from that date until August 19, 1954. Thereafter he was partially disabled but returned to his duties as a fireman and continued to perform them until November 15, 1954, on which date he again became totally temporarily disabled as a result of the accident in which he was injured. Appellee had a partial disability since the date of the accident and his disability has become permanent. Appellee, by his petition, asked the city council of appellant to conduct a hearing and to ascertain that such partial disability has become permanent and that he was entitled to benefits of the Firemen's Pension Act applicable to appellant.

The city council held a hearing as appellee requested and it concluded that he was not entitled to a pension because he was not suffering from any disability that did not permit him to perform the duties of a fireman of the city of Scottsbluff, Nebraska. The city council did not ascertain that any partial disability suffered by appellee had become permanent.

Appellee contested the action of the city council by petition in error in the district court. It alleged in sub-

stance the matters above recited and asserted error in the proceedings of the city council because it failed to find that appellee was entitled to a pension as provided in the Firemen's Pension Act applicable to appellant, it failed to take action necessary to assure appellee such a pension, and it found that appellee was not suffering from any disability that did not permit him to perform the duties of a fireman of appellant. A transcript of the proceedings before the city council was made part of the petition in error.

The district court found that appellee was entitled to a pension as provided in section 35-203, R. R. S. 1943, that he became disabled from the accident, that such disability became permanent within 12 months of the date, and that there was error in the proceedings of the city council. The finding and order of the city council were reversed and it was ordered to provide appellee with a pension of at least one-half of the salary received by him and other benefits provided by the Firemen's Pension Act applicable to appellant commencing with July 1, 1955. This appeal is from that adjudication.

Appellee became a member of the fire department of appellant on June 20, 1949. He was serving in that capacity September 11, 1953, when he was injured while assisting in fighting a fire in the performance of his duties as a fireman. He was at that time the driver of a truck of the department. He drove it to the location of the fire and was in the act of engaging a gear so that the pump on the truck would operate. Appellee had his left hand on the handle or lever provided to engage the gear when it was forcibly kicked back and the wrist of appellee was injured. His left wrist immediately felt like it was sprained. It was swollen and painful for about a month before appellee sought medical aid. During that time he carried on his duties as a fireman. Thereafter for about 2 months the wrist was in a cast. Improvement of the member was not obtained and appellee consulted another practitioner

who examined appellee and concluded that he had a torn capsule of the left wrist joint. The doctor referred appellee to an orthopedic surgeon of Casper, Wyoming, who operated on appellee April 7, 1954, for the purpose of fusing or stabilizing the wrist. Appellee returned to his work as a fireman August 19, 1954, and continued to work until November 15, 1954. During this period his wrist caused him agonizing pain but he performed his assignments as best he could. He consulted a doctor in Cheyenne, Wyoming, who had been recommended to him. The first attempt to fuse or stabilize the wrist was not accomplished and a second operation was performed in Cheyenne on November 15, 1954, as a further effort to stabilize the wrist. There was surgery on the wrist a third time in April 1955 for the removal of a piece of bone from it. Appellee was under treatment with the Cheyenne, Wyoming, doctor from November 15, 1954, to the time of the hearing before the city council July 12, 1955.

The petition of appellee to the city council alleged that he was then, June 13, 1955, a fireman of the paid fire department of appellant. He testified at the hearing July 12, 1955, that he was then a member of that fire department. He said in his petition in error that he was a fireman of appellant. It was verified by appellee August 10, 1955. Appellant did not challenge these assertions of appellee by any proof. They must be accepted as true in this litigation. Barkalow Bros. Co. v. English, 159 Neb. 407, 67 N. W. 2d 336. Appellee has not attempted to do any work since November 15, 1954. He said the doctor advised him not to engage in any effort which would involve lifting or working with his left wrist. He has no disabling defect or condition other than his left wrist. Appellee was paid his regular salary from the time he was injured September 11, 1953, for 12 months. In fact, the record shows that he was paid salary to July 1, 1955, which was 11 days prior to the hearing before the city council.

The accident in which appellee was injured, and from which any disability he suffers resulted, happened September 11, 1953. The request made to the city council in reference to his injury and disability was his petition to it of June 13, 1955. This was more than 21 months after the accident involved in this cause. The relevant parts of section 35-203, R. R. S. 1943, the statute applicable to cities of the first class that do not have a home rule charter, are: "In case any fireman in a paid fire department in any city of the first class * * * shall become permanently and totally disabled from accident or other cause, while in the line of his duty, such fireman shall forthwith be placed upon the roll of pensioned firemen, at the rate provided for retired firemen in section 35-201; * * * in case of partial disability of a fireman received while in the line of duty, he shall receive his salary during the continuance of such disability for a period not to exceed twelve months; and provided further, if it shall be ascertained by the board of fire and police commissioners or other proper municipal authorities within twelve months that such disability has become permanent, then his salary shall cease and he shall be entitled to the benefits of the provisions with reference to pensions referred to in sections 35-201 to 35-205." The rate provided for retired firemen in section 35-201, R. R. S. 1943, referred to in the above quotation is expressed by this language: "Such pension shall be at least fifty per cent of the amount of salary such retiring fireman is receiving at the time he goes upon such pension list; Provided, in no case shall the amount of such pension be less than fifty dollars per month."

The right of a fireman to any of the benefits specified is statutory and the Legislature had authority to attach any condition to the existence of the right it desired. In the instance of the right claimed in this cause the condition of it is that the proper municipal authorities ascertain within 12 months of the accident

that the disability resulting therefrom has become permanent. This requirement as a condition of the right implies an obligation of the city council, if there is no board of fire and police commissioners in the municipality concerned, upon demand of the fireman claiming the benefits of the statute, to hold a hearing, take evidence, and ascertain and declare whether or not the disability of the fireman has become permanent. The proper municipal authorities may of their own volition perform this function but the statute does not require this of them.

In State ex rel. Gaddis v. Bryan, 102 Neb. 506, 167 N. W. 783, the court said concerning section 2518, Rev. St. 1913, which is now section 35-203, R. R. S. 1943: "The section of the statute under which this action is brought contemplates a hearing, the presentation of proof, and a decision based thereon by a board of city officials as a condition precedent to right of pension."

In Cox v. Dunn, 243 Ala. 176, 9 So. 2d 1, it is said: "The right to a pension is purely statutory and does not arise until an application and proof is made as the statute requires."

In 70 C. J. S., Pensions, § 7, p. 430, it is declared: "The legislature may establish the procedure under which pensions are to be granted, and the right to a pension does not arise except where the procedure prescribed by statute is followed."

The court stated in Linaka v. Firemen's Pension Fund, 346 Pa. 459, 31 A. 2d 122: "When claimant's husband was killed 'in the discharge of his duty', her right to the pension thus provided for in the by-laws became a vested right. Before she could obtain that pension she had to apply for it and to establish facts which brought her claim within the prescriptions of the by-laws. The quoted phrase 'entitled to apply for a pension' simply meant that if the widow wished to receive the pension provided for in such cases, the duty of acting was upon her. The 'door' to a pension

was opened by her husband's death but she had to enter that door and prove certain facts before the pension would be put in her grasp."

The following appears in Badger v. Homan, 45 Cal. App. 2d 235, 113 P. 2d 925: "The respondent further argues that section 5 of the ordinance is self-executing, that nothing was required of him in the way of procedure, and that when he became disabled it was the duty of the pension board to order him placed upon the pension list. * * * Section 5, while it permits retirement on pension for disability caused by service injury, provides that it shall be allowed only when the injury is such as to render necessary such retirement from active service, and that the pension board shall then order the pension paid to 'such person retired thereafter'. This indicates that the suffering of the injury is not to automatically retire the person and that some hearing or determination is to be had. The precise amount of injury which would necessitate a retirement from active service is not fixed and from the very language used a question of fact is necessarily left for the decision of some fact-finding body. * * * The sections just referred to show that section 5 is not self-executing. In any event, a hearing and action by the pension board is required and certain minimum requirements must be complied with before the pension board has authority to order the retirement on pension of a member of the department."

The Missouri court said in State ex rel. Lambert v. Flynn, 348 Mo. 525, 154 S. W. 2d 52: "If the members of either the board of trustees, the board of police commissioners or the medical board had wrongfully refused to perform a statutory duty, the claimant would have a remedy. But the police retirement pension system is entirely statutory, and the statutes provide an administrative tribunal and certain prerequisites to action by it. The courts are not authorized to intrude * * * unless and until the statutory conditions have been

complied with and administrative remedies have been exhausted."

Broadhurst v. City of Fall River, 278 Mass. 167, 179 N. E. 586, expresses the following: "The question presented for decision is whether a pension granted by the mayor under St. 1924, c. 278, is a binding obligation upon the defendant unless and until approved by the Fall River board of finance * * *. Said c. 278 relates to the pensioning of laborers in the city of Fall River. * * * It provides in § 1 that a laborer in the employ of that city in the position of the plaintiff 'may, at his request and with the approval of the mayor, be retired from service, and if so retired he shall receive from said city for the remainder of his life an annual pension' of a stated amount. If that statute alone be considered, the plaintiff is entitled to receive payments on the pension. * * * But in this connection the scope and effect of St. 1931, c. 44, must be considered. * * * The design of that chapter, as disclosed by all its provisions, is to create a board of finance * * * and to vest in that board complete control over all the financial affairs of that city. * * * It follows that, as matter of statutory construction, the granting of the pension to the plaintiff by the mayor, without approval by the board of finance, imposed no liability upon the defendant."

State ex rel. Lynch v. Board of Trustees of Fireman's Pension & Relief Fund, 117 La. 1071, 42 So. 506, contains these expressions: "It will be seen that the law itself has fixed the class of persons to whom the pension shall be paid and does not leave the determination of that question to the board. * * * So far as that is concerned, the law itself controls the situation. The law has, however, left to the board the decision whether as a matter of fact the person applying for a pension has brought herself into and under the class provided for under the terms and conditions fixed in the statute."

The author says in 3 McQuillin, Municipal Corporations (3d Ed.), § 12.161, p. 554: "The procedure for the

granting of pensions is generally prescribed by statute or other appropriate law, which should be complied with in order to warrant the granting of a pension."

The statute granting the right claimed by appellee prescribed ascertainment, within a limited period by proper authorities of the municipality, of a fact as a condition precedent to the right. § 35-203, R. R. S. 1943; State ex rel. Gaddis v. Bryan, *supra*. Appellee made no attempt to secure such ascertainment of the designated fact within the time limited. He had no right to the benefit he sought when he initiated the proceeding eventuating in this appeal. If he had made his petition to the city council within 12 months of the accident and if the city had refused or failed to act thereon until after the expiration of the period limited by the statute, appellee could not have been prejudiced by such delay. He also in that event could have compelled action on his petition by the city. Appellee could not, however, extend the time within which he was required to make request to or demand upon the city for action by postponing the time of his demand or request. Dillon v. Board of Pension Commissioners, 18 Cal. 2d 427, 116 P. 2d 37, 136 A. L. R. 800; State ex rel. Lambert v. Flynn, *supra*.

The original Firemen's Pension Act of Nebraska provided that a fireman of a paid fire department of a metropolitan city or city of the first class who became permanently and totally disabled from any cause while in the line of duty should be placed upon the roll of pensioned firemen at 25 percent of his then salary. It provided no compensation for any disability less than total and permanent. Laws 1895, c. 39, § 3, p. 169.

The amendment of 1909 provided that the firemen of a paid fire department of a metropolitan city or a city of the first class who became permanently and totally disabled from any cause while in the line of duty should be placed upon the roll of pensioned firemen at the rate of 50 percent of the then salary of the

fireman but in no case less than $50 per month; that in case of partial disability of a fireman received while in the line of duty, he should receive his salary during the continuance of such disability for a period not to exceed 12 months; and that if it was ascertained by proper municipal authorities within 12 months that such disability had become permanent, then his salary should cease and he should be entitled to "the benefits of the provisions with reference to pensions referred to in this act." Laws 1909, c. 60, § 3, p. 291.

The act of 1923 on this subject, Laws 1923, c. 151, p. 367, was adjudged invalid by this court. Axberg v. City of Lincoln, 141 Neb. 55, 2 N. W. 2d 613, 141 A. L. R. 894.

The act of 1943 provided the identical benefits for a fireman of a paid fire department in a metropolitan city or a city of the first class which did not have a home rule charter who became permanently and totally disabled or who suffered partial disability as were provided in the act of 1909 as detailed above. Laws 1943, c. 92, p. 313.

The act of 1943 also contained provisions affecting any city of the first class having a home rule charter. One of these was that such a city was authorized to establish by its charter pensions for the members of its fire department provided a minimum requirement in favor of such fire department should consist of provisions identical with all of those contained in section 5 of the act (now sections 35-205 to 35-214, R. R. S. 1943) except that at the option of any such city more liberal provisions for such firemen might be made. It also provided that any fireman who was permanently and totally disabled from any cause while in the line of duty should be placed on the roll of pensioned firemen and should be paid 50 percent of the salary of the fireman but in no case less than $50 per month. The foregoing was followed by this provision: "In case of temporary total disability of a fireman received while in line of duty,

he shall receive his salary during the continuance of such disability for a period not to exceed twelve months: Provided, if it shall be ascertained by the city council or other proper municipal authorities within twelve months that such disability has become permanent, then his salary shall cease and he shall be entitled to the benefits of the foregoing provisions with reference to pensions in case of total and permanent disability." Laws 1943, c. 92, § 5(6), p. 317. The provisions last referred to are now contained in sections 35-204 and 35-211, R. R. S. 1943.

The interpretation of the language "partial disability" which has been contained in the Firemen's Pension Act applicable to any city of the first class that did not have a home rule charter since 1909 presents a problem of importance and some difficulty. There is no specific language in any of the acts mentioned above which attempts to define the terms used in this respect. The original legislation provided compensation for permanent total disability of a fireman which resulted from some cause while he was performing his duties as fireman. Disability of that degree has been a primary concern of all subsequent legislation on this subject. If the words of section 35-203, R. R. S. 1943, "in case of partial disability" are to be interpreted literally, then any disability suffered by a fireman because of something that occurred while he was in the line of duty, without regard to the degree of disability, entitles him to his then salary while his disability continues, not to exceed 12 months; and if it is ascertained, as the statute permits, that such a disability has become permanent, without regard to its degree, then he is entitled, according to the literal terms of the legislation, to the same amount of benefits as if he had been totally and permanently disabled at the precise time he became victim of the accident or other cause that affected him. It cannot reasonably be said the Legislature intended that a fireman who suffered only a small degree of permanent disability

should have the same benefits and recovery as a fireman who from some cause is immediately rendered totally and permanently disabled. It is not probable that the Legislature intended that a city of the first class without a home rule charter should be compelled to compensate a fireman for any degree of disability he suffered less than total and permanent disability but that the minimum disability of a fireman for which a home rule city of the first class should be liable was temporary total disability.

The legislation of 1923 on this subject attempted to classify cities of the first class which were not home rule cities as one class and cities of the first class which were home rule cities as another class. It was in 1942 adjudged invalid on the basis that it did not operate in the same manner on all members of the class, that is, on all cities of the first class of the state. Axberg v. City of Lincoln, *supra*. The Legislature the following year attempted to put all cities of the first class of the state on the same basis as to at least minimum benefits for disabled paid firemen. A part of this effort is represented in the legislation it adopted applicable to cities of the first class having a home rule charter which provides: "In case of temporary total disability of a fireman * * * he shall receive his salary during the continuance of such disability for a period not to exceed twelve months: Provided, if it shall be ascertained by the city council * * * within twelve months that such disability has become permanent, then his salary shall cease and he shall be entitled to the benefits of the foregoing provisions with reference to pensions in case of total and permanent disability." Laws 1943, c. 92, § 5(6), p. 317; § 35-211, R. R. S. 1943. The Legislature, of course, knew that the language in another part of the same legislation applicable to cities of the first class that were not home rule cities was: "in case of partial disability of a fireman." Laws 1943, c. 92, § 3, p. 314; § 35-203, R. R. S. 1943. These considerations are con-

vincing that the Legislature understood and intended the language "in case of partial disability of a fireman," § 35-203, R. R. S. 1943, to describe and mean precisely the same condition expressed by the words "in case of temporary total disability of a fireman." § 35-211, R. R. S. 1943. The interpretation and meaning of the words in the former section "partial disability" are that they were intended to and do mean temporary total disability.

Appellee did not suffer temporary total disability because of and at the time of the accident on September 11, 1953. He continued to perform his regular duties as a fireman until April 4, 1954. During the period commencing with that date and continuing through August 18, 1954, he did no work as a fireman because of the first operation performed on his wrist. He returned to his work as a fireman August 19, 1954, and performed all the duties assigned to him or requirements made of him in that capacity through November 14, 1954. He was disappointed when he returned to work as a fireman on August 19, 1954, that another fireman had been assigned to drive the truck appellee had previously operated for the fire department of the city. Appellee testified that he could have driven the truck all right at that time. He thought that he should have been reinstated as driver of the fire truck he had previously operated. There was a second operation on the wrist November 15, 1954. Appellee did not do or offer to do any work as a fireman for the city during the period from November 15, 1954, to the date of the hearing before the city council July 12, 1955. He was paid his salary as fireman through the month of June 1955. During the hearing appellee said he was a member of the fire department of appellant. The record is silent of any attempt of the city to dispense with the services of appellee as a fireman of the city. The city council found he was able to perform his duties as a fireman.

Appellee, before and at the time of the hearing, oper-

ated his automobile when he was alone wherever he desired to go within or without the city of Scottsbluff. He testified that he was then able to operate a fire truck and the pumps on the truck without difficulty at a fire. He said he could handle the hydrants at a fire and that there was always one fireman assigned to that operation during a fire. He testified he could perform the duties of a fireman except he could not handle the hoses, set up or erect the ladders, or ride the tailboard of a truck. The left wrist of appellee was injured. It had been by surgery stabilized. He has lost movement of the wrist joint and the left arm has been slightly shortened. He is otherwise, so far as the record indicates, sound of body. He has the use of it and all of its members except as the use of the left wrist is limited. Its use, however, is still considerable. The record does not contain any estimate of any degree of disability of appellee. Evans v. City of Lincoln, 147 Neb. 163, 22 N. W. 2d 565, speaks of what constitutes permanent total disability as contemplated by the Firemen's Pension Act: "A fireman is permanently and totally disabled under the Firemen's Pension Act when the disability from which he suffers renders him permanently unable to obtain, hold, or do any substantial amount of remunerative work, either in his previous occupation or in any other established and recognized field of employment for which he is fitted. * * * Total disability contemplates the loss of earning power and in measuring such loss consideration will be given to the ability to earn wages, eligibility to procure employment generally, ability to hold a job obtained, and the capacity to perform the tasks of the work in which a person is engaged." The record does not justify a conclusion that appellee is totally and permanently disabled.

The legislative plan is that temporary total disability of a fireman that is not ascertained to have become permanent within 12 months after the accident shall be wholly compensated by payment by the city to him of

his salary during the continuance of the disability not to exceed 12 months. If the temporary total disability is ascertained within 12 months to have become permanent, then the fireman is entitled at the end of 12 months after the accident to be placed upon the roll of pensioned firemen of the city and to receive and enjoy the benefits provided for totally and permanently disabled firemen. §§ 35-203 and 35-211, R. R. S. 1943.

The judgment should be and it is reversed and the cause is remanded with directions to the district court for Scotts Bluff County to dismiss the petition in error.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, District Judge, participating on briefs.

CITY OF BAYARD, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. NORTH CENTRAL GAS COMPANY, A CORPORATION, APPELLANT.
83 N. W. 2d 861

Filed June 14, 1957. No. 34191.

1. **Public Service Commissions.** Courts should review or interfere with administrative and legislative action of the railway commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights.
2. **Public Service Commissions: Appeal and Error.** On an appeal to the Supreme Court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.
3. **Carriers.** A private carrier is one who, without making it a vocation, or holding himself out to the public as ready to act for all who desire his services, undertakes, by special agreement in a particular instance only, to transport property from one place to another either gratuitously or for hire.
4. **Public Service Commissions: Carriers.** Any person, corporation, or association holding itself out to the public as offering its services to all persons similarly situated and performing as its public vocation the services of transporting passengers, freight, messages, or commodities for a consideration or hire,

is a common carrier in the particular spheres of such employment, and such operation for hire is a jurisdictional prerequisite to the general control and regulation of its rates and services as a common carrier by the state railway commission.

APPEAL from the Nebraska State Railway Commission. *Reversed and dismissed.*

Wright, Simmons & Harris, for appellant.

Kenneth F. Williams and *Perry, Perry & Nuernberger,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and WHITE, District Judge.

CHAPPELL, J.

Plaintiff, City of Bayard, same being a city of the second class, filed a complaint with the Nebraska State Railway Commission, hereinafter called the commission, alleging that defendant, North Central Gas Company, a Wyoming corporation, was an intrastate common carrier of natural gas, subject to regulation of its rates, services, and general control by the commission. Plaintiff sought an order directed to defendant, requiring it to show cause why it should not be so determined by the commission and be required to serve plaintiff with and sell it natural gas at wholesale rates fixed by the commission in the event plaintiff city, by eminent domain or otherwise, acquired title to defendant's natural gas distribution system located within plaintiff city and its environs.

Such a show cause order was duly issued and served, whereupon defendant filed an answer denying that it was a common carrier and denying that the commission had any jurisdiction over or authority to regulate and control defendant's rates and services. After admitting certain allegations in plaintiff's complaint, which need no repetition here, defendant alleged that it owns and maintains pipe lines for the transportation of its own natural gas to supply its own distribution systems for

the sale of natural gas at retail to ultimate consumers; that defendant is not now and never has been a common carrier of natural gas or other petroleum products; that it is not now and never has been engaged in the sale of natural gas or other petroleum products at wholesale for resale by others; and that an order of the commission requiring defendant to sell natural gas to plaintiff city at wholesale in event it acquires defendant's local natural gas distribution system therein would deprive defendant of its property for public use without just compensation and without due process of law, contrary to the Constitution of the State of Nebraska and the Constitution of the United States.

After a hearing by the commission, it entered an order finding that plaintiff's complaint should be sustained; that the commission had jurisdiction of the parties and subject matter with authority to prescribe rates, regulate sevices, and exercise general control over defendant as a common carrier, and ordered: "* * * that in event complainant acquires, by lawful means, title to the gas distribution system of defendant, now owned and operated in said city, that said defendant shall provide sufficient supplies of natural gas to said city, at rates which shall hereinafter be established by the Commission, after full and complete hearing, whereat the parties of interest may appear and present evidence." Thereafter, defendant's motion for rehearing was overruled, and it appealed to this court, assigning that the commission erred: (1) In entering an order upon a state of facts which had not yet arisen but which were contingent and uncertain; (2) in finding that it had jurisdiction of the subject matter of plaintiff's complaint, and had jurisdiction and authority to prescribe rates, regulate services, and exercise general control over defendant; and (3) in rendering the order aforesaid. We sustain assignments Nos. 2 and 3, which requires no discussion of assignment No. 1.

As stated in In re Application of Richling, 154 Neb.

108, 47 N. W. 2d 413: "The powers of the railway commission are derived from the Constitution. It is provided in part in Article IV, section 20, Constitution of Nebraska: 'The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision.' In the absence of implementing legislation the powers of the railway commission under this section are plenary in character and self-executing. But when the Legislature acts within the scope of the constitutional provision, the railway commission is subjected to the provisions of such legislation. Rodgers v. Nebraska State Railway Commission, 134 Neb. 832, 279 N. W. 800."

In State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N. W. 2d 502, we held that: "The State Railway Commission is authorized by the Constitution to regulate rates and service and to have general control of common carriers, within the state, as the Legislature may provide by law, and in the absence of specific legislation its powers and duties are unqualified.

"The powers and duties of the State Railway Commission are derived from and an independent part of the Constitution, and are administrative, legislative, and judicial.

"The authority of the State Railway Commission to regulate and control common carriers as the Legislature may provide by law, means in the manner in which the Legislature provides by specific legislation."

In Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756, we held: "Courts should review or interfere with administrative and legislative action of the railway commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights.

"On an appeal to the supreme court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made." See, also, Chicago, B. & Q. R. R. Co. v. Herman Bros., Inc., *ante* p. 247, 82 N. W. 2d 395; Hooper Telephone Co. v. Nebraska Telephone Co., 96 Neb. 245, 147 N. W. 674.

In the light of such rules and authorities hereinafter cited, we have examined the record. The material and relevant evidence, which is not disputed, is summarized as follows: Plaintiff's mayor testified as a witness for plaintiff that the question of acquiring defendant's local gas distribution system by eminent domain had been submitted to the electors of plaintiff city and carried; and that thereafter a certificate of the result was submitted to this court and a three-judge condemnation court was organized at Bridgeport. He testified that at the present time defendant supplies natural gas at retail to users thereof in plaintiff city; that no other natural gas company was furnishing natural gas in plaintiff city; that the nearest other natural gas pipe line was that of the Kansas-Nebraska Natural Gas Company located 9 miles east of plaintiff city; and that upon inquiry that company advised that it would not be interested in supplying plaintiff with natural gas. A consulting engineer testified as a witness for plaintiff, but his testimony dealt almost entirely with rates, which, as we view it, is unimportant here.

Defendant's secretary since 1946 testified as a witness for defendant that he was entirely familiar with defendant's operations since that time. The first time defendant was able to purchase intrastate gas from Nebraska fields for sale to ultimate consumers in plaintiff city was in 1951. Prior thereto defendant served such ultimate consumers with interstate gas purchased by defendant from Sand Drew Field in Wyoming, but

since 1951 defendant has acquired natural gas intrastate out of Huntsman Field in Nebraska with which it has served plaintiff city and its inhabitants. Defendant's pipe lines run from Sidney up to Northport, east to Lewellen, from Northport to Mitchell, and coming the other way from Glenrock, Wyoming, down to the state line. Defendant carries only gas purchased by it and sold only at retail by delivery to ultimate consumers through its own distribution systems. Defendant so serves Sidney, Dalton, and Gurley in the north part, then east to Broadwater, Northport, Lisco, Oshkosh, and Lewellen, then west to Bayard, Minatare, Scottsbluff, Gering, Mitchell, Morrill, and Henry. Defendant owns the distribution system in each of those cities and towns, and all gas transported by defendant is supplied to ultimate users at retail through those distribution systems. Defendant has never sold gas at wholesale or to others for resale, and its directors have never authorized the sale of gas at wholesale. Defendant's articles provide that it will conduct a "natural gas business." Defendant does not sell gas at wholesale in any cities or towns in any state. It now has a sufficient supply of gas from Nebraska to supply all inhabitants in all of the cities and towns that it now serves in Nebraska. There possibly could be interstate gas to serve some of those cities from time to time, but by and large all of the supply comes from Nebraska fields. Although unimportant here, he testified that the Wyoming Public Service Commission regulates defendant's retail rates, but has never fixed any wholesale rates, and the Federal Power Commission does not regulate defendant although its pipe line starts at Glenrock, Wyoming, and follows down the Platte River into Nebraska near Henry, which territory is supplied with gas at retail from Wyoming. No other municipality served by defendant has ever condemned its property for the purpose of making it municipally owned.

Defendant's manager for 26 years of that part of its

system from Douglas, Wyoming, to Lewellen, Nebraska, testified as a witness for defendant. He testified that gas from Huntsman Field, being routed from Huntsman to Northport and west, has supplied plaintiff city since 1951. Defendant's pipe line from Huntsman Field to plaintiff city is about 47 miles long. Gas from that field supplies gas intrastate for all the east end of defendant's own distribution systems, from Scottsbluff east, including Sidney, Gurley, Dalton, Minatare, Bridgeport, Northport, Broadwater, Lisco, Oshkosh, Scottsbluff, and Lewellen, but Mitchell and towns west are supplied interstate from Wyoming. In that connection, however, defendant has a junction station whereby it can if necessary supply the east end with Wyoming gas and the west end with Nebraska gas. In addition to users in the foregoing cities and towns, defendant sells gas at retail to some alfalfa mills and industrial plants, but otherwise defendant has never sold gas to anyone or any town or city either in Wyoming or Nebraska except at retail through its own distribution systems. He testified that to serve customers, a gas distributor must have reserves and potential customers in order to acquire it, and normally, as far as he knows, there is only one gas supplier for each city or town because the nature of the business is such that it operates better and more efficiently if the business has a monopoly in a local area.

Defendant's 25-year franchise in plaintiff city expired in March, and the governing body of the city did not want to renew it. In that connection, section 17-125, R. R. S. 1943, provides in part that: "* * * such city may, after such period, make any reasonable regulation with reference to any person, firm or corporation holding such franchise either as to charges for such gas or electricity or otherwise." Such section was construed in Kansas-Nebraska Natural Gas Co. v. City of St. Edward, 234 F. 2d 436, and City of University Place

v. Lincoln Gas & Electric Light Co., 109 Neb. 370, 191 N. W. 432.

Although defendant's franchise has expired, it has continued to distribute and sell gas at retail in plaintiff city, and there is no evidence that defendant has refused to continue to do so. Such witness testified that defendant's franchise with cities and villages served by it regulates the retail rate by agreement and approval by the city council. Defendant builds its own line to the source of supply, carries its own gas therein, and then distributes and sells it to ultimate consumers as a matter of contract between defendant and the city. Defendant has never at any time sold at wholesale and does not want to get into the wholesale business as plaintiff city desires it to do.

By stipulation, exhibit No. 3, a private reciprocal standby service contract entered into between defendant and Kansas-Nebraska Natural Gas Company, Inc., was received in evidence. As disclosed thereby, its primary purpose was to provide for the establishment of an interconnection between their pipe line systems in the vicinity of the Huntsman plant, which would enable either party to deliver gas to the other if required in order to meet an emergency situation on the other party's pipe line system. Also in that connection, the Kansas-Nebraska Natural Gas Company purchases natural gas from the oil field near Sidney, and has a gas distribution system in Alliance. That company has a pipe line from near Sidney north to Alliance, which passes through Northport and parallels defendant's line from Northport to Huntsman Field near Sidney. Their contract provides for operation of both lines from near Sidney to Northport by defendant. The Kansas-Nebraska Natural Gas Company puts its gas into its line near Sidney and withdraws at Northport the same volume of gas as required by it to provide gas service north of Northport. Defendant operates both such lines, although one is owned by Kansas-Nebraska Natural Gas

Company and defendant is paid for such operation 1½ cents per 1,000 cubic feet of natural gas carried in the line for Kansas-Nebraska Natural Gas Company.

Contrary to plaintiff's contention, such single contract would not make defendant a common carrier of natural gas and require it to carry such gas for any one applying for such service. It does not bring defendant within the definition of a common carrier as hereinafter defined. It does not constitute a holding of itself out to the public as engaged in the business of transporting gas from place to place for a consideration or hire, nor offer itself to the public generally as such. In that connection, defendant was simply a private carrier as defined in 13 C. J. S., Carriers, § 4, p. 31, wherein it is said, citing authorities: "A private carrier is one who undertakes by special agreement in a particular instance to transport property without being bound to serve every person who may apply. A private carrier of goods has been defined as one who, without being engaged in the business of carrying as a public employment, undertakes to deliver goods in a particular case for hire or reward; but this definition is not strictly correct in so far as it implies that one who does not carry for hire or reward is not a private carrier; and more accurately stated, a private carrier is one who, without making it a vocation, or holding himself out to the public as ready to act for all who desire his services, undertakes, by special agreement in a particular instance only, to transport property from one place to another either gratuitously or for hire."

We turn then to certain statutes and other applicable authorities to ultimately determine whether or not plaintiff was a common carrier with its rates and services subject to general regulation and control by the commission. In doing so, we conclude that it was not.

Section 75-201, R. R. S. 1943, provides: "The State Railway Commission shall have the power to regulate the rates and services of, and to exercise a general con-

trol over, all railroads, express companies, car companies, sleeping car companies, freight and freight-line companies, and all other common carriers engaged in the transportation of freight or passengers within this state."

Section 75-301, R. R. S. 1943, provides in part: "The term 'common carriers' as used in said sections (75-101 to 75-512) shall be taken to include all corporations, companies, individuals and associations of individuals, * * * that may now or hereafter own, operate, manage or control any railroad, interurban or street railway line, * * * or part thereof, or any express company, car company, sleeping car company, freight and freight line company, telegraph and telephone companies, and any other carrier engaged in the transmission of messages or transportation of passengers or freight *for hire.*" (Italics supplied.)

Section 75-601, R. R. S. 1943, provides: "Any company, corporation or association, formed or created for the purpose of transporting, transmitting or conveying crude oil, petroleum, or the products thereof, or gases, from one point in the State of Nebraska to another point in the State of Nebraska *for a consideration,* are hereby declared to be common carriers. Any such company, corporation or association desiring or requiring a right-of-way or rights-of-way for the laying and maintaining of any pipe line or lines for such purpose within the State of Nebraska, and being unable to agree with the owner or lessee of any land, lot, real estate or right-of-way on the amount of compensation for the use and occupancy of so much of any lot, land, real estate or right-of-way as may reasonably be necessary for the laying, relaying and maintenance of any such pipe line, shall have the right to acquire the same for such purpose, as hereinafter provided. *Such company, corporation or association* is hereby placed under the control and subject to regulation by the State Railway Commission, and subject to Chapter 75, so far as the provisions thereof are applicable to pipe lines *as common carriers.*"

(Italics supplied.) Such section was amended, effective May 21, 1951, but only for the purpose of providing procedure for exercising the power of eminent domain as provided in sections 76-704 to 76-724, R. S. Supp., 1951. In that connection, it will be noted that the italicized words, "Such company, corporation or association" appearing in the last sentence of the section, refer back to those "formed or created for the purpose of transporting, transmitting or conveying * * * gases, from one point in the State of Nebraska to another point in the State of Nebraska *for a consideration,* * * *." (Italics supplied.)

Plaintiff's contention that defendant was a common carrier because it had exercised the right of eminent domain under section 75-601, R. R. S. 1943, has no merit for two reasons. First, defendant does not render the service of transporting gas for a consideration. Second, as shown by exhibit A, attached to and made a part of plaintiff's complaint, defendant in 1950 exercised the right of eminent domain as an interstate pipe line, as distinguished from an intrastate pipe line, under the provisions of section 75-609, R. R. S. 1943, in the manner provided therein, which it concededly had a right to do.

Section 75-609, R. R. S. 1943, provides: "Any company, corporation or association formed or created for the purpose of transporting or conveying crude oil, petroleum or other products thereof in *interstate commerce* through or across the State of Nebraska, and desiring or requiring a right-of-way, and being unable to agree with the owner or lessee of any land, lot or right-of-way for the amount of compensation for the use and occupancy of so much of any lot, land, real estate or right-of-way as may be reasonably necessary for the laying, relaying and maintenance of any such pipe line, shall have the right to acquire the same for such purpose in the manner provided in sections 75-601 to 75-607 as to companies formed or created for transporting or conveying crude oil, petroleum or the products there-

of within the State of Nebraska." (Italics supplied.) Such section was amended effective May 21, 1951, by adding thereto, "or intrastate within the State of Nebraska," after the word "Nebraska," and providing procedure for the exercise of eminent domain under sections 76-704 to 76-724, R. S. Supp., 1951. Such section in neither event contained any provision that such interstate pipe line companies were common carriers and thereby "placed under the control and subject to regulation by the State Railway Commission * * * as common carriers." Assuming herein, for purpose of argument, that defendant would be a common carrier if it held itself out to the public generally as engaged in transporting, transmitting, or conveying of gases "for a consideration," or "for hire," defendant did not do so and would not be a common carrier then or now. Defendant simply supplies and sells its own gas to ultimate consumers at retail. It renders no transportation services for hire.

In that connection, this court and other authorities have specifically defined a common carrier. In State ex rel. Winnett v. Union Stock Yards Co., 81 Neb. 67, 115 N. W. 627, this court concluded that any person, corporation, or association holding itself out to the public as offering its services to all persons similarly situated and performing as its public vocation the services of transporting passengers, freight, messages, or commodities for a consideration or hire, is a common carrier in the particular spheres of such employment. In the opinion it is said: "The statute, we think, has reference to all companies or persons who hold themselves out to the public as engaged in those things which characterize it as a common carrier. It has been said that a common carrier is one who holds itself 'out as ready "to carry at reasonable rates such commodities as are in his line of business for all persons who offer them, as early as his means will allow."' Faucher v. Wilson, 68 N. H. 338, 39 L. R. A. 431, and cases cited."

In State v. Southern Elkhorn Telephone Co., 106 Neb. 342, 183 N. W. 562, this court said: "In order that a company be a common carrier, it is essential, in view of this statutory definition, as well as by the generally recognized meaning of the term 'common carrier,' that the service rendered by it must be a service that is rendered for hire. It was said by Justice Story in Citizens Bank v. Nantucket Steamboat Co., 5 Fed. Cas. (No. 2730) 719, 725: 'I take it to be exceedingly clear that no person is a common carrier in the sense of the law, who is not a carrier for hire; that is, who does not receive, or is not entitled to receive, any recompense for his services. The known definition of a common carrier, in all our books, fully establishes this result.' If no compensation is received, 'he is not in the sense of the law a common carrier; but he is a mere mandatory, or gratuitous bailee; and of course his rights, duties and liabilities are of a very different nature and character from those of a common carrier.'

"As pointed out in 10 C. J. 41, sec. 10: 'The law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have neither expressly assumed that character nor by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it.'" Thereafter, quoting with approval from State ex rel. Buffum Telephone Co. v. Public Service Commission, 272 Mo. 627, 199 S. W. 962, L. R. A. 1918C 820, it is said: "'Operation for hire is a prerequisite to supervision by the commission. The reason is plain.'"

As stated in 9 Am. Jur., Carriers, § 4, p. 430, citing numerous authorities: "Subject to the qualifications and elaborations hereinafter noted, a common carrier may be defined, very generally, as one who holds himself out to the public as engaged in the business of transporting persons or property from place to place, for compensation, offering his services to the public generally." Also, as said in § 9, p. 435: "No person is

a common carrier who does not carry for hire; that is, who does not receive, or is not entitled to receive, any compensation for his services." Further, as said in § 15, p. 437, citing numerous authorities: "It is well established that the state cannot, consistent with constitutional guaranties against infringement upon private property rights, by legislative fiat or edict or by the orders of an administrative commission, arbitrarily impose the character or status of a common carrier upon a mere private carrier or other person who has not devoted his property to such a public use."

In the light of the evidence and foregoing rules of law, we conclude that defendant is not a common carrier for hire or a consideration, and is not subject to regulation and control by the commission as a common carrier. Thus, we conclude that the state railway commission had no jurisdiction or authority to render the order involved herein. We find no constitutional or statutory provisions which would authorize us to hold otherwise. Authorities cited by plaintiff are distinguishable upon the facts or constitutional and statutory provisions.

Other issues were raised and discussed in briefs of counsel, but in view of our conclusion that defendant is not a common carrier subject to regulation of its rates and services or under the general control of the commission, we do not deem it necessary to discuss them.

For reasons heretofore stated, we conclude that the order of the Nebraska State Railway Commission should be and hereby is reversed and the cause is dismissed. All costs are taxed to plaintiff.

REVERSED AND DISMISSED.

S. S. KRESGE COMPANY, APPELLANT, V. CARL W. JENSEN, TREASURER, DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLEES.

83 N. W. 2d 569

Filed June 14, 1957. No. 34193.

1. **Declaratory Judgments: Parties.** The state is not a necessary party in an action by a taxpayer for a declaratory judgment attacking the validity of an assessment brought against the county treasurer and the county in which the property was assessed.
2. **Taxation.** The assessment of property is not final until acted upon by the county and state boards of equalization, and not until the action of the latter is certified to the county clerks of the different counties and by them extended upon the tax rolls.
3. ———. Individual discrepancies and inequalities must be corrected and equalized by the county board of equalization.
4. **Taxation: Judgments.** One aggrieved by the action of a county board of equalization may appeal to the district court. One who fails to pursue this remedy is precluded from objecting to the valuation of his separate property for taxation purposes and a collateral attack may not be made thereon except where the assessment is void, willfully discriminatory, or the result of fraud.
5. **Taxation: Constitutional Law.** It is the function of the county board of equalization to determine the actual value of property for tax purposes and give effect to the constitutional requirement that taxes be levied uniformly and proportionately upon all taxable property.
6. ———: ———. The right of a taxpayer, whose property alone is taxed at 100 percent of its actual value, is to apply to the county board of equalization to have his assessment reduced to the percentage of that value at which others are assessed, even though this is a departure from the requirements of the statute. Uniform and proportionate taxation is a constitutional requirement and consequently the prime consideration.
7. **Taxation.** The State Board of Equalization and Assessment cannot deal with individual assessments, nor take into consideration inequalities as between individual taxpayers. It deals only with the values of the taxable property of a county in the aggregate.
8. **Taxation: Judgments.** When a taxpayer fails to exercise his right to a hearing before the county board of equalization regarding his individual property valuation for tax purposes, or to appeal therefrom if he is dissatisfied, he is precluded

from attacking the amount of the valuation collaterally because of a valid order of the State Board of Equalization and Assessment raising the valuation in the aggregate of all property in the county to secure uniform and proportionate assessments. This is so even if it results in the assessment of his individual property in excess of its actual value.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed.*

Young, Holm & Miller and *John E. North,* for appellant.

Eugene F. Fitzgerald, George C. Pardee, John C. Burke, Edward F. Fogarty, Bernard E. Vinardi, and *William R. King,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an action for a declaratory judgment determining the rights and obligations of appellant with reference to its liabilities for personal property taxes for 1953. The parties defendant are Carl W. Jensen, treasurer for Douglas County, Nebraska; Metropolitan Utilities District of Omaha; the Municipal University of Omaha; the School District of Omaha; the City of Omaha; the County of Douglas; and the State of Nebraska. The trial court found against the appellant and dismissed the action. The appellant has appealed.

The appellant, whom we shall hereafter refer to as the company, is a Michigan corporation duly qualified to transact business in this state. It operates two retail stores in the city of Omaha. On April 20, 1953, the company filed its personal property tax return on its two stores covering the value of its stock inventories and the furniture and fixtures. The evidence is stipulated and consequently there is no question of fact to be here determined.

The company calculated the valuation of its inventory in its downtown store in the following manner: A physical inventory of all goods, wares, and merchan-

dise in the store was taken as of the close of business on December 31, 1952. This inventory was extended to show its cost value in the amount of $134,699. The amount of merchandise purchased in January and February 1953, amounting to $127,959, was added thereto, making a total of $262,658. The sales for the months of January and February 1953, amounted to $173,835. The percent of gross profit for these 2 months was shown to be $65,119. This latter item was deducted from the gross sales for January and February 1953, leaving a cost inventory for those months of $108,716. This item was deducted from the total cost of purchases made, leaving a cost inventory of $153,942, which it returned for assessment purposes. The company also reported the cost price of all furniture and fixtures at $117,994. It returned this item for taxation purposes at 50% of its cost, the same being $58,997. The total valuation of inventory and furniture and fixtures for tax purposes amounted to $212,939. By a similar method of calculation the inventory and furniture and fixtures at the South Omaha store were reported at $43,146 and $19,014 respectively. The total taxable value of the South Omaha store was therefore returned at $62,160.

The record shows that on July 28, 1953, the State Board of Equalization and Assessment increased the valuation of business schedules in Douglas County by 40 percent. On November 3, 1953, the county treasurer demanded a personal property tax on the downtown store on taxable valuation of $149,060 and an actual valuation of $298,120 instead of the total valuation of $212,939 as reported by the company. On the same day taxes were demanded on the personal property of the South Omaha store upon a taxable valuation of $43,510 based upon an actual valuation of $87,020, instead of the total valuation of $62,160 as reported by the company. On December 10, 1953, the company tendered $4,717.78 in payment of all taxes due on the

downtown store and $1,376.26 for all taxes due on the South Omaha store. The tendered payments were the amounts due on the 100 percent actual valuation fixed by the county board of equalization before the State Board of Equalization and Assessment made its order increasing the valuation of business schedules in Douglas County by 40 percent. The tenders were refused and this action commenced to compel their acceptance.

It will be noted that the company reported its inventories at its actual cost and the furniture and fixtures at 50 percent of cost. There is no evidence of any depreciated value of the furniture and fixtures. Assuming that the stipulated facts are sufficient to find that the furniture and fixtures were reported for assessment purposes at their actual value, the result would necessarily be the same as in the case of the stock inventories.

The State of Nebraska filed a special appearance by which it was asserted that it was subject to suit only in Lancaster County and that the district court for Douglas County was without jurisdiction. The special appearance was sustained. It is now contended that the State of Nebraska is a necessary party and that the district court for Douglas County was without jurisdiction to hear the action. This issue was determined in Offutt Housing Co. v. County of Sarpy, 160 Neb. 320, 70 N. W. 2d 382, wherein we said: "Relying solely upon section 25-21,159, R. R. S. 1943, defendants also argued that the state was a necessary party defendant, thus there was a defect of parties. We conclude that the contention has no merit. * * * This court has uniformly entertained jurisdiction in cases brought to enjoin the collection of void taxes wherein only the county in which the property is located and the county treasurer thereof have been made parties defendant. Rothwell v. Knox County, 62 Neb. 50, 86 N. W. 903; Y. M. C. A. of Omaha v. Douglas County, 60 Neb. 642, 83 N. W. 924, 52 L. R. A. 123. See, also, 28 Am. Jur., Injunc-

tions, § 275, p. 450." The State of Nebraska is not a necessary party in an action by a taxpayer for a declaratory judgment attacking the validity of an assessment brought against the county treasurer and the county in which the property was assessed.

It is the contention of the company that it reported its stock inventories and furniture and fixtures to the assessor of Douglas County at actual value and that the 40 percent increase ordered by the State Board of Equalization and Assessment had the effect of taxing the property included in its business schedules at 140 percent of actual value. It contends that this is unlawful under section 77-201, R. S. Supp., 1953, which in part provides: "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value which shall be entered opposite each item and shall be assessed at fifty per cent of such actual value." It will be observed that in the instant case the company assumes that the cost of its stock inventory is its actual value. This, of course, is not so. The statute defines actual value as the value in the market in the ordinary course of trade. § 77-112, R. R. S. 1943. The cost of a stock of merchandise is not its actual value although it may be evidence properly to be considered in determining actual value. Actual value is largely a matter of opinion. There are no yardsticks by which it can be determined with complete accuracy.

The Constitution of this state provides that necessary revenue shall be raised by taxation in such manner as the Legislature may direct. It provides also that taxes shall be levied uniformly and proportionately upon all tangible property and franchises with one exception not material here. It further provides that the Legislature may prescribe standards and methods for the determination of the value of real and other tangible property at uniform and proportionate values. Art VIII, § 1, Constitution. Pursuant to these provisions

the Legislature has provided the method of determining the value of tangible property for tax purposes. The principal ground relied on here is the alleged fact that the stocks of merchandise and furniture and fixtures of the company were valued by the county board of equalization at their full and actual value, and that the proposed increase ordered by the State Board of Equalization and Assessment will result in the overvaluation of the property and operate to compel it to pay taxes on property in excess of its actual value contrary to section 77-201, R. S. Supp., 1953.

We point out that the company listed its stock of merchandise and furniture and fixtures and placed its own value thereon. This value was accepted by the county board of equalization and the company took no exception thereto, nor did it appeal therefrom. It is therefore a finding by the county board of equalization, acting quasi-judicially, of the actual value of the property for tax purposes. But it is only one step in determining the value of the property for taxation purposes. After the county board of equalization has fairly and impartially equalized the valuations and heard grievances and complaints regarding the assessments made, and acted to review and correct the same, it is the duty of the State Board of Equalization and Assessment to equalize assessments between the different counties to effectuate the uniformity and proportionate value provisions of the Constitution. In accomplishing this purpose the State Board of Equalization and Assessment is empowered to increase or decrease the aggregate valuation of any county by a percentum. Upon certification of such increase or decrease to the county clerk, it is mandatory upon such clerk to put the order in effect. As has been stated, such an order was made in the instant case increasing the value of property listed as business schedules by 40 percent. The company did not appeal from this order. Consequently, the method of attaining the taxable value

of the company's property as prescribed by the Legislature was followed and no appeals taken therefrom.

It is the function of the county board of equalization to determine the actual value of the property for taxation purposes. While the county board of equalization acts in a quasi-judicial capacity and its valuations are final as to individual taxpayers unless appealed from, such valuations are subject to the powers of the State Board of Equalization and Assessment, which powers have been described by this court as being purely incidental to a proper equalization of the assessment of the different counties of the state as returned to that body. Hacker v. Howe, 72 Neb. 385, 101 N. W. 255. Both the county board of equalization and the State Board of Equalization and Assessment, however, must give effect to the constitutional requirement that taxes must be levied uniformly and proportionately upon all tangible property. It is evident that actual value and a uniform and proportionate value may not always result in identical results. In dealing with such a situation arising in this state, the Supreme Court of the United States said: "This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law." Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979. It could well be added that the application of this principle to the findings of the county board of equalization makes it possible for the State Board of Equalization and Assessment to fairly equalize between counties without doing injustice to individual taxpayers. We necessarily con-

clude that as to an individual taxpayer the remedy for overvaluation or a failure to receive a uniform and proportionate valuation of his property at the hands of the county board of equalization is by direct appeal to the courts and not by a collateral attack. Hacker v. Howe, *supra;* Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489; County of Howard v. State Board of Equalization & Assessment, 158 Neb. 339, 63 N. W. 2d 441; LeDioyt v. County of Keith, 161 Neb. 615, 74 N. W. 2d 455. There is no contention here made that the assessment made by the county board of equalization is void, or that it resulted from willful discrimination or other fraudulent conduct on the part of the assessment or equalization officers. The assessments fixed by the county board of equalization are therefore valid and not subject to collateral attack.

It is contended that the action of the State Board of Equalization and Assessment in raising the value of all business schedules in Douglas County by 40 percent, including the property here in question, has increased the taxable value of the property to 140 percent of actual value. No appeal was taken from the order of the state board by the company and, in fact, the validity of its order is not questioned. The company is now in no position to question the validity of the order of the State Board of Equalization and Assessment. LeDioyt v. County of Keith, *supra;* Hess v. Board of Equalization of Boone County, 141 Neb. 405, 3 N. W. 2d 653; Homan v. Board of Equalization of Boone County, 141 Neb. 400, 3 N. W. 2d 650.

The contention that the order of the State Board of Equalization and Assessment had the effect of raising the taxable value of the company's property in excess of its actual value has no merit. In County of Howard v. State Board of Equalization & Assessment, *supra,* this court said: "The cited case pointed out that any taxpayer who deemed his property not fairly assessed with respect to other property in the county was privileged

to resort to the county board of equalization for correction of such inequity. If the taxpayer failed to avail himself of such a remedy, then he had no ground for complaint of the subsequent action of the State Board in raising or lowering valuations of the county even though the result thereof might be the assessment of his individual property on a basis in excess of actual value." See, also, Bunten v. Rock Springs Grazing Assn., 29 Wyo. 461, 215 P. 244; Columbia Terminals Co. v. Koeln, 319 Mo. 445, 3 S. W. 2d 1021; First Nat. Bank of Greeley v. Patterson, 65 Colo. 166, 176 P. 498.

The company relies on Webb & Jones v. Renfrew, 7 Okl. 198, 54 P. 448. This case appears to sustain the position taken by the appellant. We do not concur in the views expressed therein. An assessed valuation over and above actual value appears to be violative of the Oklahoma Constitution and is construed as being void as to the excess. In this state, overvaluation is an irregularity only which must be appealed to the courts if relief is desired, except where it involves a void, a willfully discriminatory, or a fraudulent assessment in which event a collateral attack may properly be made.

We conclude that the company is not entitled to the relief here sought. Its proper remedy was by appeal to the district court from the valuations fixed by the county board of equalization. Since it has failed to pursue this remedy, the company is now precluded from objecting to the valuation of its property for taxation purposes.

The judgment of the trial court is correct and its order dismissing the action is affirmed.

AFFIRMED.

WILLIAM NIKLAUS, FOR THE BENEFIT AND ON THE BEHALF OF THE CITY OF LINCOLN, NEBRASKA, A BODY POLITIC, AND THE TAXPAYERS AND RESIDENTS OF SAID CITY, APPELLANT, V. ABEL CONSTRUCTION COMPANY, A DOMESTICATED FOREIGN CORPORATION, ET AL., APPELLEES.

83 N. W. 2d 904

Filed June 28, 1957. No. 34145.

1. **Actions.** The expression "in their proper persons" contained in section 7-110, R. R. S. 1943, patently is derived from the Latin "in propria persona" and means in their own persons.
2. **Taxation: Municipal Corporations.** Although taxpayers have an interest which entitles them to protect the interest of a municipal corporation, the cause of action remains in the corporation, and final relief is for its benefit.
3. **Taxation.** If a taxpayer is permitted to maintain a taxpayer's suit, it is not in his individual right, but as the representative of the district whose interests are alleged to be jeopardized by the inefficiency or maladministration of its officers.
4. ———. In a taxpayer's action potentially all of the taxpayers and citizens are parties.
5. **Actions.** As a general rule a plaintiff cannot join an individual cause of action and a representative cause of action.
6. **Taxation: Municipal Corporations.** Section 15-322, R. R. S. 1943, clearly recognizes that the cause of action is that of the city and not that of the citizen or taxpayer.
7. ———: ———. Where the officers of a public corporation refuse to put the necessary judicial machinery in motion upon demand being made therefor and failure to so act, a taxpayer may bring suit on behalf of himself and others similarly situated. The direct injury to be remedied where the taxpayer intervenes and sets the judicial machinery in motion for that purpose is not personal and direct to himself, but to the corporation.
8. **Attorney and Client: Courts.** Courts will not permit laymen to appear in court in a representative capacity and such a rule may not be circumvented by subterfuge.
9. ———: ———. While a layman may represent himself in court, he cannot, even on a single occasion, represent another, whether for a consideration or not.
10. **Attorney and Client: Actions.** Proceedings in a suit by a person not entitled to practice are a nullity, and the suit may be dismissed.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

Herbert W. Baird, for appellant.

Woods, Aitken & Aitken, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an action brought by William Niklaus "for the benefit and in behalf of the City of Lincoln, Nebraska, a body politic," as recited in the caption of the petition and as recited in the body of the petition "for benefit of city of Lincoln." The defendants are Abel Construction Company, a corporation, and "Universal Surety Company."

The petition recited that plaintiff is a citizen and taxpayer and that the city of Lincoln is a municipal corporation operating under a Home Rule charter. It recited that a demand upon the mayor and city council to bring the action would be useless and that immediate action was necessary to protect the citizens and taxpayers.

The petition then, in nine separate causes of action, alleged that the city of Lincoln entered into paving contracts with the Abel Contruction Company; that the Universal Surety Company provided the performance bond; and that the contracts are illegal and void. It further alleged that payments by the city had been made under the contracts in amounts unknown to the plaintiff and that future payments would be made unless enjoined. It prayed for judgment "for benefit of city of Lincoln, Nebraska," in the sum of $1,000,000 and for a permanent injunction to prevent future payments.

The petition was filed May 2, 1953. On May 29, 1953, an "Amended and Supplemental Petition at Law" was filed. This petition in its caption recited, "William

Niklaus, for the benefit and on the behalf of the City of Lincoln, Nebraska, a body politic and the tax-payers and residents of said City, Plaintiff." The amended petition begins, "* * * plaintiff for the benefit of the City of Lincoln, * * *."

Among other things it alleged that on May 14, 1953, demand was made on the mayor and council to refrain from further performance of all contracts referred to in the amended petition and to bring action to recover monies "illegally paid" thereunder and that the demand had not been complied with. Although not stated in the petition, it appears from the briefs that this allegation as to a demand is based on section 15-322, R. R. S. 1943. Petitioner then in 24 separate causes of action made allegation about 24 paving contracts between the city and Abel Construction Company wherein the Universal Surety Company furnished the performance bond. It alleged that the contracts were "corrupt, fraudulent, illegal and void." It sought a recovery of judgment on the 24 causes of action in the sum of $740,948.60, "for the benefit and on behalf of the City of Lincoln, Nebraska, a body politic and the tax-payers and residents of said City."

Issues were made and trial was had. At the close of all the evidence defendants moved for a dismissal and judgment for each of them on three grounds: (1) The amended petition did not state facts sufficient to constitute a cause of action; (2) the evidence was insufficient to sustain a judgment in favor of the plaintiff; and (3) "The record now shows that William Niklaus, plaintiff herein, has engaged in illegal and unauthorized practice of law in connection with the institution and prosecution of this action and the various proceedings therein. And said unlawful and unauthorized conduct has nullified the entire proceedings."

The trial court made findings of fact, dismissed the action, and taxed costs to the plaintiff.

Plaintiff appeals. Defendants here ask for affirmance

urging, among other reasons, that above quoted from their motion in the trial court.

Mr. Niklaus was admitted to the practice of the law at the bar of this court on the 1st day of July 1914.

By opinion filed June 29, 1948, Mr. Niklaus' license to practice law was revoked and he was disbarred from the further practice in this state. That order has not been modified or set aside. State ex rel. Nebraska State Bar Assn. v. Niklaus, 149 Neb. 859, 33 N. W. 2d 145.

We are then at the outset confronted with questions that go directly to the integrity of judicial proceedings and the administration of justice in this state.

The first question is: Was Mr. Niklaus practicing law in this case contrary to the order of disbarment? If that question is answered in the affirmative, then the next question is: What is its effect on the litigation here involved?

The evidence is that the petition in this action was drafted by Herbert Baird, a member of the bar of this state. It is signed by Mr. Niklaus as plaintiff and beneath that, "Herbert Baird Atty for Pff." The amended petition bears Mr. Niklaus' personal signature and beneath that, "By Herbert Baird Atty for Pff." It is obvious that Mr. Niklaus' signature was not signed "by" Mr. Baird. Mr. Niklaus filed the original petition with the clerk of the district court.

The praecipe for the issuance of summons filed with the original petition bears the personal signature of Mr. Niklaus. Mr. Baird did not sign the praecipe.

Section 25-501, R. R. S. 1943, provides: "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon."

It is obvious that Mr. Niklaus, and not Mr. Baird, caused the summons to be issued.

Section 7-112, R. R. S. 1943, provides: "Upon filing original papers in any case, it shall be the duty of an attorney to endorse thereon his name."

During the progress of this case Mr. Niklaus prepared and filed praecipes for subpoenas duces tecum to witnesses. These are signed, "William Niklaus per se." Mr. Baird's signature does not appear on these instruments.

During the progress of this case plaintiff filed some 72 interrogatories. These interrogatories were framed in collaboration with Mr. Baird, and in part contained questions suggested by Mr. Niklaus. Mr. Niklaus typed the interrogatories. He argued to the court the questions presented by the defendants' objections to the interrogatories.

A number of motions were filed in the case and argued to the court before Judges Polk and Spencer. Mr. Niklaus denied arguing these motions to Judge Polk. He did argue motions before Judge Spencer and at times when Mr. Baird was not in the courtroom. Mr. Niklaus made research of the legal questions that were involved in these motions. Mr. Niklaus argued a motion for the inspection of records.

He was asked and answered this question: "Q Now in connection with your preparation of this case have you made extensive research of law? A I have." Mr. Niklaus looked up the law and prepared several briefs. He prepared and submitted to the court a "brief in support of plaintiff's motion to strike." This contained a statement of issues, law, and an extensive argument. He likewise prepared a "brief of plaintiff on *discovery* under statutory conditions." This contains citations of decisions and argument. This brief was presented to the court by Mr. Niklaus in connection with oral argument.

Likewise before trial Mr. Niklaus submitted to the trial court a volume which he elected to call a "compilation" of authorities on municipal contracts, many of which he related to the issues involved in this litigation. Mr. Niklaus made the research involved in the compilation and denominated it as his "private property."

Likewise, by oral motion to the court made by him-

self, Mr. Niklaus dismissed two of the 24 causes of action contained in the amended petition.

When the case came on for trial Mr. Baird appeared for the plaintiff and conducted the trial during the presentation of the case-in-chief.

During the defendants' case-in-chief Mr. Niklaus objected to the admission of certain exhibits "as already in. Encumbering the record." Again on two occasions when exhibits were offered he advised the court, "No objection."

The defendants offered a witness for cross-examination and Mr. Niklaus started to conduct the examination. Objection was made that he was not licensed to practice law. Mr. Niklaus then "relinquished any right" he had to examine the witness, and Mr. Baird then proceeded to conduct the examination. This is the first time that such objection was made.

The receipt for the bill of exceptions in this case is signed "Herbert W. Baird William Niklaus" over the typewritten words "Counsel for Plaintiff." The William Niklaus signature is obviously the personal signature of Mr. Niklaus. The signature "Herbert W. Baird" bears no similarity to the admitted signatures of Mr. Baird. It does not appear that Mr. Baird participated in the settling of the bill of exceptions.

Plaintiff's briefs here bear the name of Mr. Baird as attorney for the plaintiff.

The case was put on the final call and set for oral argument to be had on May 7, 1957. On April 29, 1957, Mr. Niklaus filed in this court, over his own signature, a motion for an order permitting him to present the oral argument. This was based on the serious illness of Mr. Baird and plaintiff's "clear right to present such argument" under the provisions of sections 7-101 and 7-110, R. R. S. 1943.

The notice of the motion was served on defendants May 1, 1957. Defendants resisted the motion on the ground that this action was a representative and class

action and that Mr. Niklaus was without authority to argue it.

On May 6, 1957, Mr. Niklaus appeared in court, addressed the court, and submitted the motion without argument. We denied the motion. Thereafter and on the same day Mr. Niklaus filed here a motion for a continuance so as to obtain the service of counsel. We denied the motion.

On May 7, 1957, the case was called for oral argument. Mr. Niklaus addressed the court and submitted the cause on the record and the briefs.

There can be no question but that Mr. Niklaus was here engaged in the practice of the law. Beginning with the preparation and filing of the praecipe for summons down to the submission of this cause to this court, he was actively, openly, and persistently performing the duties and exercising the powers of a member of the bar of this state. See State v. Fisher, 103 Neb. 736, 174 N. W. 320.

Patently he was directing the conduct of this litigation, at times in collaboration with Mr. Baird and at times independently of him. The professional ethics of Mr. Baird's conduct in this matter is not here presented and is not determined.

The question here is not that of Mr. Niklaus' right to bring this action as a taxpayer. The question is his right to appear in this action and perform the duties and exercise the powers of a member of the bar of this state.

Mr. Niklaus contends that he has not engaged in the illegal practice of the law. He relies here upon the provisions of sections 7-101 and 7-110, R. R. S. 1943. Section 7-101, R. R. S. 1943, provides: "No person shall practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings or other papers to be signed and

filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state. No such paper shall be received or filed in any action or proceeding unless the same bears the endorsement of some admitted attorney, or is drawn, signed, and presented by a party to the action or proceeding. It is hereby made the duty of the judges of such courts to enforce this prohibition. Any person who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days; but this section shall not apply to persons admitted to the bar under preexisting laws."

Section 7-110, R. R. S. 1943, provides: "Plaintiffs shall have the liberty of prosecuting, and defendants shall have the liberty of defending, in their proper persons."

The expression "in their proper persons" contained in section 7-110, R. R. S. 1943, patently is derived from the Latin "in propria persona" and means in their own persons. See Tayler's Law Glossary, pages 249 and 400. The question, then, is whether or not this action is one in which Mr. Niklaus may appear and prosecute in his own person without the services of a member of the bar of this state.

The action is one brought for the benefit of the city of Lincoln, a municipal corporation. The causes of action are alleged to be its causes of action. The judgment sought, if recovered on the causes of action, would be the judgment of the city of Lincoln and no part thereof would be the judgment of Mr. Niklaus in his own person. It is axiomatic that a corporation cannot appear in its own person. It must appear by a member of the bar.

It is obvious that Mr. Niklaus is without authority to appear and represent the city of Lincoln as its lawyer

in this litigation. That, however, is exactly the effect of what he did here.

The rule is stated as follows: "Although taxpayers have an interest which entitles them to protect the interest of the municipal corporation, the cause of action remains in the corporation, and final relief is for its benefit." 64 C. J. S., Municipal Corporations, § 2138, p. 951.

Mr. Niklaus in his petition herein alleged that he brought this action as a citizen and taxpayer for the benefit of the city of Lincoln. He signed the amended petition "for the benefit and on behalf of the City of Lincoln, Nebraska, a body politic and the taxpayers and residents of said City."

The rule is stated as follows: "If a taxpayer is permitted to maintain a taxpayer's suit, it is not in his individual right, but as the representative of the district whose interests are alleged to be jeopardized by the inefficiency or maladministration of its officers, and he has no other or higher right than the district or municipality itself could claim if the action were prosecuted in its name, and hence he can maintain the action only in cases where the district or municipality itself could do so. The derivative nature of the action is brought out forcibly in the rationale of the theory by which taxpayers' suits are maintainable as being analogous to stockholders' suits, and by the usual requirement that antecedent demand be made upon the prosecuting official of the public body to enforce the claim of such public body." 52 Am. Jur., Taxpayers' Actions, § 10, p. 7.

In a taxpayer's action potentially all of the taxpayers and citizens are parties. See Hawarden v. Youghiogheny & L. Coal Co., 111 Wis. 545, 87 N. W. 472, 55 L. R. A. 828.

As a general rule a plaintiff cannot join an individual cause of action and a representative cause of action. See, 1 C. J. S., Actions, § 97, p. 1282; Tyre v. Krug, 159 Wis. 39, 149 N. W. 718, L. R. A. 1915C 624; Archer v. City of Grand Rapids, 255 Mich. 485, 238 N. W. 267; Paradise v.

Nowlin, 86 Cal. App. 2d 897, 195 P. 2d 867; Nelson v. Smith, 107 Utah 382, 154 P. 2d 634, 157 A. L. R. 512. See, also, §§ 25-701, 25-702, R. R. S. 1943.

Section 15-322, R. R. S. 1943, contains a requirement of an antecedent demand as a condition of commencing an action of this nature for and on behalf of the city of Lincoln. If the demand is not complied with, the section authorizes a citizen to "begin and prosecute such action *in the name* of and for the benefit of the city, * * *." (Emphasis supplied.) Plaintiff alleged in his petition that such a demand would be useless. In his amended petition he alleged the demand and a failure to comply therewith.

Whether an action such as this must be brought in the name of the city by the taxpayer rather than in the name of the taxpayer is not presented for determination.

Section 15-322, R. R. S. 1943, clearly recognizes that the cause of action is that of the city and not that of the citizen or taxpayer. In Madison Metropolitan Sewerage Dist. v. Committee on Water Pollution, 260 Wis. 229, 50 N. W. 2d 424, it was held: "* * * where the officers of a public corporation refuse to put the necessary judicial machinery in motion upon demand being made therefor and failure to so act, a taxpayer may bring suit on behalf of himself and others similarly situated. * * * 'The direct injury to be remedied where the taxpayer intervenes and sets the judicial machinery in motion for that purpose, is not personal and direct to himself, but to the corporation.'"

Mr. Niklaus cannot, by the device of naming himself as a party plaintiff, convert this action into anything other than an action for the benefit of the city. Mr. Niklaus was without right to act as a member of the bar in this case. See Bay County Bar Assn. v. Finance System, Inc., 345 Mich. 434, 76 N. W. 2d 23, holding in effect that courts will not permit laymen to appear in court in a representative capacity and such a rule may not be circumvented by subterfuge.

Sections 7-101 and 7-110, R. R. S. 1943, do not apply here. On this phase of the case we adopt the language of the Supreme Court of Missouri in Liberty Mutual Ins. Co. v. Jones, 344 Mo. 932, 130 S. W. 2d 945, 125 A. L. R. 1149: "While a layman may represent himself in court he cannot even on a single occasion represent another, whether for a consideration or not."

The question then comes: What is the effect of the unlawful practice of the law by Mr. Niklaus on this litigation?

It is patent from the record that Mr. Niklaus conceived these alleged actions and admittedly made the investigations that preceded the drafting of the petitions. He has been the moving spirit in it throughout. His participation in the proceedings was not casual but persistent and continuous.

The rule is: "Proceedings in a suit by a person not entitled to practice are a nullity, and the suit may be dismissed." 7 C. J. S., Attorney and Client, § 16, p. 725.

The dismissal of a proceeding for such a cause is a drastic remedy and may not be required in all cases. The extent of the unlawful practice by Mr. Niklaus in this case requires that it be done.

This action is not taken for the benefit of lawyers who are duly admitted to the practice of the law in this state. As was said by the Supreme Court of Colorado in Bennie v. Triangle Ranch Co., 73 Colo. 586, 216 P. 718, it is "for the protection of citizens and litigants in the administration of justice, against the mistakes of the ignorant on the one hand, and the machinations of unscrupulous persons on the other, * * *." See, New Jersey Photo Engraving Co. v. Carl Schonert & Sons, 95 N. J. Eq. 12, 122 A. 307; Yount v. Zarbell, 17 Wash. 2d 278, 135 P. 2d 309; Stevens v. Jas. A. Smith Lumber Co., 54 S. D. 170, 222 N. W. 665; Jacobs v. Queen Ins. Co. of America, 51 S. D. 249, 213 N. W. 14.

The flagrant and persistent unlawful practice of law in this case by Mr. Niklaus requires that the proceedings

be held to be a nullity and the action dismissed.

The trial court properly dismissed the action. For the reasons here given, the judgment of the trial court is affirmed.

AFFIRMED.

RAYMOND FARRELL ET AL., APPELLEES, V. SCHOOL DISTRICT NO. 54, LINCOLN COUNTY, NEBRASKA, ET AL., APPELLANTS.
84 N. W. 2d 126

Filed June 28, 1957. No. 34165.

1. **Constitutional Law: Schools and School Districts.** Article VII, section 6, of the Constitution of this state vests all matters pertaining to schools and school districts, their creation, dissolution, government, and control in the Legislature. In all such matters the state is supreme.
2. **Schools and School Districts.** Section 79-481, R. R. S. 1943, provides for the procedure to be followed at the time an original transfer is made of pupils from the school district of their residence in one county to an adjoining school district of another county for educational purposes.
3. ———. Section 79-481, R. R. S. 1943, does not provide for a renewal of a transfer of pupils from the school district of their residence in one county to an adjoining school district of another county, but authorizes the parents or guardians of such pupils to recall a request for an original transfer within 15 days after the county clerk has received the certificate of transfer.
4. ———. Section 79-482, R. R. S. 1943, provides in part that when such transfer shall have been made the children shall enjoy school privileges in the adjoining school district for only one year, unless the parents or guardians of such children shall give notice in writing to the county superintendent not less than 15 days before each annual meeting or election, asking that the transfer be continued for one year. A transfer once granted ceases to exist unless a renewal is made as required by this section. When a transfer is once renewed, it is in existence for a period of one year and may not in the interim be recalled, revoked, or canceled.
5. ———. The procedure for a recall of an original transfer as provided in section 79-481, R. R. S. 1943, cannot apply so as

to provide for a recall of a renewal of a transfer as provided for in section 79-482, R. R. S. 1943.

6. **Statutes.** The fundamental principle of statutory construction is ascertainment of the intent of the Legislature. The court will not read into a statute exceptions not made by the Legislature. Where a statute is clear and unambiguous in its terms, it is the duty of the court, in construing a statute, to give the language used by the Legislature its plain and ordinary meaning.

7. **Schools and School Districts.** Section 79-486, R. S. Supp., 1955, authorizes the governing board of any public school district in this state to contract with the district board of any neighboring public school district or districts for the instruction of pupils residing in the first-named district in the school or schools maintained by the neighboring district or districts for a period not exceeding 3 years, when a majority of the votes cast at the annual or special meeting of a school board favor such a proposition.

8. ———. School boards of Class II districts are creatures of statute with power to bind the district only within the limits fixed by the Legislature.

9. ———. A Class II school district is a creature of statute possessing no powers to contract beyond those granted by the Legislature.

10. ———. In case a Class II school district enters into a contract without the power granted by the Legislature such contract must be declared void and invalidated in an appropriate action.

11. ———. The Legislature intended, by enacting section 79-483, R. R. S. 1943, that parents or guardians of children transferred to a school district in an adjoining county, while such transfers are in effect, are not entitled to vote and are not considered legal voters in their home school district.

12. **Statutes.** When the Legislature reenacts a law, it thereby adopts the judicial construction which has theretofore been placed upon it.

13. ———. The Legislature is presumed to have known the effect which such statute originally had, and by its reenactment to have intended that that same effect should again be had.

14. **Elections.** Section 32-1001, R. R. S. 1943, which deals with election contests, does not include a school district election held for the purpose of contracting for the instruction of pupils.

15. **Injunctions: Taxation.** In an action instituted by a resident taxpayer, a court of equity will restrain public officers from illegally creating a debt or obligation which must be paid by taxation.

APPEAL from the district court for Lincoln County: JOHN H. KUNS, JUDGE. *Affirmed.*

Maupin, Dent, Kay & Satterfield and *William E. Morrow, Jr.*, for appellants.

Baskins & Baskins, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action in equity brought by Raymond Farrell, Hans L. Johnson, Jr., Z. A. Russell, C. O. Shadonix, and Frank Kramer, legal voters and taxpayers of school district No. 54, Lincoln County, Nebraska, plaintiffs and appellees, against School District No. 54, Lincoln County, Nebraska, School Board of school district No. 54, Lincoln County, Nebraska, Archie Konruff, president of the school board of school district No. 54, and Lloyd Lovitt, secretary of the school board of school district No. 54, defendants and appellants, to enjoin the defendants from performing or carrying out a contract with school district No. 2, Logan County, Nebraska, for the instruction of school children of school district No. 54.

It is agreed by the parties that school district No. 54 and school district No. 2 are Class II schools. We will not repeat that school district No. 54 is in Lincoln County, Nebraska, and school district No. 2 is in Logan County, Nebraska, but refer to such school districts as school district No. 54 and school district No. 2.

The trial court entered judgment to the effect that each of the said defendants should be permanently enjoined from expending any money of school district No. 54 under and by virtue of the terms and conditions of said contract, from causing the pupils of school district No. 54 to be instructed in school district No. 2 for the 1956-1957 school year for the period of one year, and from in any other manner performing any of the terms and conditions of said contract.

The defendants filed a motion for new trial which was overruled. From the overruling of the motion for new trial, the defendants appealed.

The facts are stipulated and agreed to as set forth in the appellants' brief, and are as follows: On June 11, 1956, at 2 p.m., the annual meeting of the legal voters of school district No. 54 was held in the schoolhouse of school district No. 54, and at that time there was submitted to the legal voters of school district No. 54 for their determination the following proposition: "Should the School Board of School District No. 54, Lincoln County, Nebraska, contract with the School Board of School District No. 2, Logan County, Nebraska, for the instruction of pupils residing in School District No. 54, for the 1956-1957 school year, for the period of one year?" The vote upon said proposition by the legal voters of school district No. 54 was by ballot and resulted in a tally of 15 in favor of said proposition and 12 against said proposition. Since there was a majority in favor of the proposition, Archie Konruff, the president of the school board of school district No. 54, and Lloyd Lovitt, secretary of the school board of school district No. 54, in their official capacities as such officers, immediately executed a contract with the school board of school district No. 2 for the instruction of the pupils of school district No. 54.

It was stipulated for purposes of the trial of the action that Raymond Farrell, Mary E. Farrell, C. O. Shadonix, Twyla Shadonix, Catherine Shadonix, Hans L. Johnson, Jr., Maudie Johnson, Z. A. Russell, Emma Russell, Alfred Russell, Frank Kramer, and Robert Kramer were legal voters of school district No. 54, were present at the school meeting of school district No. 54, and voted against said proposition. It was further stipulated that Joseph P. Dolan, Kathryn Dolan, Harry W. Frey, Mildred M. Frey, Alice Hutchens, Charles A. Hutchens, Lloyd Lovitt, and Maxine Lovitt were also present and voted upon said proposition.

Prior to the holding of the annual meeting of the legal voters of school district No. 54, the Dolan, Frey, Hutchens, and Lovitt families had either requested continuances of their transfers or had made original requests for transfers from school district No. 54 to school district No. 2, as follows: Joseph P. Dolan made original request for transfer from school district No. 54 to school district No. 2 on June 19, 1954, then was granted a continuance of his transfer for the 1955-1956 school year, and on May 4, 1956, again requested and was granted a continuance of his transfer for the 1956-1957 school year. Harry W. Frey made original request for transfer from school district No. 54 to school district No. 2 on May 12, 1953, then was granted continuance of his transfer for the school years 1954-1955 and 1955-1956, and on May 22, 1956, again requested and was granted a continuance of his transfer for the 1956-1957 school year. Mrs. Charles A. Hutchens made an original request for transfer from school district No. 54 to school district No. 2 on May 31, 1956, which request was granted. Lloyd Lovitt made an original request for transfer from school district No. 54 to school district No. 2 on May 22, 1956, which request was likewise granted.

Subsequent to the time Joseph P. Dolan, Harry W. Frey, Mrs. Charles A. Hutchens, and Lloyd Lovitt made their respective requests for either continuances of transfer or original requests for transfers and on June 8, 1956, the four named individuals caused to be filed in the office of the county superintendent of Lincoln County, Nebraska, and in the office of the county superintendent of Logan County, Nebraska, a notice requesting that their individual temporary transfers from school district No. 54 to school district No. 2 for the 1956-1957 school year be canceled and such a cancellation be made effective immediately.

The appellants' assignments of error may be stated as follows: (1) The trial court erred in failing to hold that Joseph P. Dolan, Kathryn Dolan, Harry W. Frey,

and Mildred M. Frey were legal voters of school district No. 54 on June 11, 1956, and entitled to vote upon the proposition of the school board of school district No. 54 contracting with the school board of school district No. 2 for the instruction of the school children of school district No. 54 for the 1956-1957 school year; (2) the trial court erred in failing to find that the vote on said proposition was 15 in favor and 12 against the proposition; and (3) the trial court erred in failing to find that the plaintiffs had an adequate remedy at law under the provisions of Chapter 32, article 10, R. R. S. 1943.

The appellants assert and contend that the Dolans and Freys possessed a right guaranteed by the Constitution and statutes of this state to vote at the annual school meeting in the district of their residence on the proposition above mentioned. In support of this contention, the appellants cite Article I, section 22, of the Constitution of the State of Nebraska, as follows: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise."

Article VII, section 6, of this state's Constitution provides: "The legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." This provision of the Constitution leaves all matters pertaining to schools and school districts, their creation, dissolution, government, and control with the Legislature. In all such matters the state is supreme. See, Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566; School District No. 49 v. School District No. 65-R, 159 Neb. 262, 66 N. W. 2d 561. The Legislature is authorized to and has established different qualifications for voters in a school district election than those for voters voting in a general election. The appellants concede this to be true. See, Cunningham v. Ilg, 118 Neb. 682, 226 N. W. 333; State ex rel. Crosby

v. Cones, 15 Neb. 444, 19 N. W. 682. We find no merit to the appellants' contention.

The appellants contend that a request for a continuance of transfer under the provisions of section 79-482, R. R. S. 1943, is subject to cancellation and revocation by the parent requesting the transfer; that the trial court found the Dolans and Freys did not have a right to cancel and revoke their respective requests for transfers from school district No. 54 to school district No. 2 and as a consequence they were not legal voters of school district No. 54 on June 11, 1956, when the election was held at the annual meeting of school district No. 54; and that as a result of the trial court's holding, the vote was changed showing 11 votes for the proposition heretofore set out and 12 votes against it. The appellants' contention is that the Dolans and Freys had the legal right to revoke and cancel their respective requests for transfers, and the trial court erred in finding that they did not possess such rights. The following sections of the statute are pertinent to a determination of the appellants' contention.

Section 79-481, R. R. S. 1943, provides: "When the transfer of children from a school district located in one county to a school district located in another county is involved, the county superintendent of each such county shall notify the county clerk, of the county in which the county superintendent has jurisdiction, of each transfer granted, using such forms of notice as the Superintendent of Public Instruction shall prescribe. The county clerk of the county to which the transfer for school purposes is made shall certify to the county clerk of the county in which the applicant for such transfer resides the number of mills of school taxes then voted in the district to which the transfer is made. It shall then be the duty of the county clerk of the county in which the applicant resides to levy, within fifteen days after the receipt of the certificate of transfer, unless it be recalled at the request of the parent or guardian of

such children in the meantime, under the authority of the county board of said county, upon all taxable property belonging to such applicant, real or personal, situated on lands thus transferred, an amount equal to and not exceeding the number of mills of school taxes being voted in the district to which the transfer is made. All such tax money derived from such levy shall be collected by the county treasurer of the county in which the property to be taxed is located and shall be paid by him to the county treasurer of the county to which transfer has been made. A proper receipt for such taxes shall be executed and drawn to the favor of the county treasurer from whom such taxes are received. The receipt shall set forth the purposes of such taxes and shall designate the school district entitled to receive all such taxes. The county treasurer of the county to which transfer was made shall place such taxes to the credit of the district."

It will be noted that section 79-481, R. R. S. 1943, provides for the procedure to be followed at the time the original request for transfer is made. It does not provide the procedure for a renewal of a transfer. This section authorizes the parents and guardians to recall a request for an original transfer within 15 days after the county clerk has received the certificate of transfer. At that time the county clerk has made no change in his official records, and makes no change therein until the expiration of 15 days from the date of receipt of the transfer. Once the county clerk changes his records to reflect the transfer, the records remain the same until he is notified that the transfer ceases to exist.

Section 79-482, R. R. S. 1943, provides: "When such transfer shall have been made the children shall enjoy school privileges in the adjoining district for only one year, unless the parent or guardian of such children shall give notice in writing to the county superintendent not less than fifteen days before each annual meeting or election, asking that the transfer be continued for one

year, using such form of notice as the Superintendent of Public Instruction shall prescribe. The notice shall state that such parent or guardian has children of school age who have not yet completed the eighth grade. A continuation of the transfer shall be granted only with the approval of the school board of the district to which such children are transferred. When the transfer shall cease to exist, the county superintendent shall notify the county clerk who shall thereupon retransfer, and the taxes of the parent or guardian and the real estate shall again be placed in the district of their residence."

It will be observed that section 79-482, R. R. S. 1943, does not provide for a recall or revocation of a renewal of a transfer. It is apparent that the legislative intent was that there should be no recall or revocation of a renewal of a transfer. This section contains the language: "When the transfer shall cease to exist," it is then the duty of the county superintendent to notify the county clerk who then is to change the records accordingly. As we read the above section of the statute, a transfer once granted ceases to exist unless a renewal is made as required by said section. Once renewed, the transfer is in existence for a period of one year and may not in the interim be recalled, revoked, or canceled.

The procedure for a recall of an original transfer, as provided in section 79-481, R. R. S. 1943, cannot apply so as to provide for a recall of a renewal of a transfer as provided for in section 79-482, R. R. S. 1943. Section 79-482, R. R. S. 1943, makes no requirement for a certificate of renewal of a transfer to be given to the county clerk. It makes no provision for the county clerk changing his records, except when notified that the transfer ceases to exist. The acts required to be done by the county superintendent and the county clerk, which determine the time limit within which a recall of an original transfer may be made (section 79-481, R. R. S. 1943), are not required to be done upon a renewal of a transfer (section 79-482, R. R. S. 1943). Thus the procedure

contained in section 79-481, R. R. S. 1943, for recall of an original transfer cannot be applied so as to recall a renewal of a transfer made under section 79-482, R. R. S. 1943. The provisions contained in section 79-481, R. R. S. 1943, deal with original transfers to adjoining school districts to which pupils are transferred. Section 79-482, R. R. S. 1943, deals with renewals of such transfers. It is obvious that the provisions of the respective sections cannot be incorporated so that each section is included within the purview of the other.

The fundamental principle of statutory construction is ascertainment of the intent of the legislature. The court will not read into a statute exceptions not made by the legislature. Where a statute is clear and unambiguous in its terms, it is the duty of the court, in construing it, to give the language used by the legislature its plain and ordinary meaning. See State ex rel. Thayer v. School District, 99 Neb. 338, 156 N. W. 641.

We conclude that the appellants' contention above stated cannot be sustained.

With reference to the right to contract, as set forth in the proposition voted upon at the annual meeting of school district No. 54, section 79-486, R. S. Supp., 1955, is pertinent. It provides in part: "The governing board of any public school district in this state, when authorized by a majority of the votes cast at any annual or special meeting, is empowered to (a) contract with the district board of any neighboring public school district or districts for the instruction of pupils residing in the first-named district in the school or schools maintained by the neighboring district or districts for a period of time not to exceed three years, and (b) make provision for the transportation of such pupils to the school or schools of the neighboring district or districts."

By the language of section 79-486, R. S. Supp., 1955, before a school board is authorized to enter into such a contract a majority of the votes cast at the annual or special meeting of the school board must be shown to

favor the proposition. This is a condition precedent. In the event a contract is entered into without compliance with this section of the statute, such contract is null and void.

School boards of Class II districts are creatures of statute with power to bind the district only within the limits fixed by the Legislature. A Class II school district is a creature of statute possessing no powers to contract beyond those granted by the Legislature. In case a Class II school district enters into a contract without the power granted by the Legislature such contract may be declared void and invalidated in an appropriate action. See Fulk v. School District, 155 Neb. 630, 53 N. W. 2d 56.

With reference to the right of parents to vote as applied to the instant case, section 79-483, R. R. S. 1943, is pertinent. This section provides: "The parents or guardians of the pupils so transferred shall have the right to vote in the district to which such pupils are transferred on all school matters except those of issuing bonds, levying a tax for building purposes, contracting for instruction, and closing the district. No parent or guardian of the pupils so transferred shall be eligible to hold office on the school board of the district to which the transfer was made."

In Cunningham v. Ilg, *supra,* this court construed section 6524, Comp. St. 1922, as amended by the Laws of 1925, c. 176, § 1, p. 459, which provided in part: "* * * the parents or guardians of the pupils so transferred shall have the right to vote in the district to which such pupils are transferred on all school matters except that of issuing bonds." It was held that by virtue of this section, parents and guardians of pupils who had been transferred to an adjoining school district were not, while such transfers were in force, legal voters of their home school district. Consequently, they were not entitled to vote on school matters in their home school district.

The history of this legislation contained in Cunningham v. Ilg, *supra,* decided July 2, 1929, shows that this section was reenacted by the Legislature. See, Laws 1927, c. 81, § 1, p. 246; Laws 1929, c. 91, § 1, p. 345; Laws 1931, c. 147, § 1, p. 401; Laws 1941, c. 162, § 1, p. 647; Laws 1941, c. 167, § 1, p. 663; Laws 1943, c. 194, § 1, p. 649; Laws 1949, c. 256, § 121, p. 733.

In Johnson v. Weborg, 142 Neb. 516, 7 N. W. 2d 65, it was held: "When the legislature reenacts a law, it thereby adopts the judicial construction which has theretofore been placed upon it. The legislature is presumed to have known the effect which such statute originally had, and by its reenactment to have intended that that same effect should again be had." See, also, Shandy v. City of Omaha, 127 Neb. 406, 255 N. W. 477.

The conclusion must be drawn, in the light of the above authorities, that the Legislature intended, relative to section 79-483, R. R. S. 1943, that parents or guardians of children transferred to a school district in an adjoining county, such as in the case at bar, while such transfers are in effect are not entitled to vote and are not considered legal voters in their home school district.

The appellants contend that the appellees had an adequate remedy at law by utilizing the law governing election contests; and that the appellees are not entitled to the relief granted them by the trial court in an injunction action.

Chapter 32, article 10, R. R. S. 1943, deals with elections and sets forth the general provisions with reference thereto. Section 32-1001, R. R. S. 1943, provides in part: "The provisions of sections 32-1001 to 32-1036 shall apply to contests on account of a general election. The election of any person to any public office, the location or relocation of a county seat, or any proposition submitted to a vote of the people may be contested: * * *." The different grounds for contest are then set forth in said section.

The appellants cite Scott v. McGuire, 15 Neb. 303, 18

N. W. 93. This case involves a relocation of a county seat. It was held that an injunction action would not lie. This type of election contest is specifically provided for in section 32-1001, R. R. S. 1943.

The appellants cite Mosiman v. Weber, 107 Neb. 737, 187 N. W. 109, wherein the court held: "Injunction is not the proper remedy to settle questions of the qualifications of election officers or whether legal votes have been rejected and illegal votes received sufficient to change the result of such election."

The appellants assert that the principle laid down in the cases cited above was reaffirmed in the case of School District No. 49 v. School District No. 65-R, *supra.* This was an injunction proceeding. The case involved an attack upon the legality of the formation of school district No. 65-R. The plaintiff, school district No. 49, sought to prevent school district No. 65-R from being put into operation insofar as it affected school district No. 49. Part of the proceedings was the submission of the question of reorganization to the electors of the school districts whose boundaries were in any manner changed by the plan of reorganization. Section 79-426.15, R. S. Supp., 1951, which provided for this election, designated it a special election and placed it in charge of the election officials charged with duties of holding general elections. The court held: "The statute has provided an adequate remedy for the settlement of the rights of parties in election cases by either contest or quo warranto and these remedies are exclusive."

The cases of Mosiman v. Weber, *supra,* and School District No. 49 v. School District No. 65-R, *supra,* are distinguishable from the case at bar. At the time the case of Mosiman v. Weber, *supra,* was decided by this court, on February 16, 1922, there was no statute in effect comparable to section 32-106, R. R. S. 1943, which provides: "Election shall mean any primary, special, municipal, or general election, except school election, at which the electors of the state or of any subdivision

thereof choose by ballot public officials or decide any public questions and propositions lawfully submitted to them." The source of this section is Laws 1951, c. 99, § 6, p. 271. It will be noted that the above-mentioned section of the statute excludes school district elections and voting from the definition of elections. There was in effect at the time Mosiman v. Weber, *supra,* was decided, a statute comparable to section 32-901, R. R. S. 1943, which provides as follows: "Election of members of governing body of school districts are excepted from the provisions of this chapter relating to the manner of voting and conduct of elections, except as otherwise provided in Chapter 79." Chapter 79 is titled "Schools." The comparable statute in effect at the time Mosiman v. Weber, *supra,* was decided was section 1946, Rev. St. 1913, which provided: "Elections for school district officers, except for members of the boards of education in cities, are excepted from the provisions of this chapter." The chapter referred to is Chapter 20, Elections, Rev. St. 1913. So, at the time of the decision in Mosiman v. Weber, *supra,* there was in effect no clear mandate of the Legislature excluding voting in school districts from the operation of the general election laws.

With reference to School District No. 49 v. School District No. 65-R, *supra,* it will be observed that the election, by legislative mandate in that case, was not a school election, but was subject to the general election laws and, of course, to an election contest.

Section 32-1001, R. R. S. 1943, must be read in conformity with sections 32-106 and 32-901, R. R. S. 1943.

We believe the following to be in point with the case at bar.

In Johnson v. Du Bois, 208 Minn. 557, 294 N. W. 839, an election contest, contestant, contestee, and one Berggreen were candidates for director of the board of education of the school district of Sauk Centre at the annual meeting and election held pursuant to law at which two directors were to be elected. The question for de-

cision was whether the district court had jurisdiction of a contest of a school district election. The court said: "The authority of courts to entertain election contests is purely statutory. Absent statutory authorization, the courts are without jurisdiction to hear and determine election contests. State ex rel. Narveson v. Village of McIntosh, 95 Minn. 243, 245, 103 N. W. 1017. If the statute did not authorize the court to entertain a school district election contest, it had no jurisdiction to hear the contest. * * * 'Sec. 2. (referring to the election laws) The word "election", as used in this act, shall mean and include any election, *except those held in any school district,* at which the electors of the state or of any subdivision thereof nominate or choose by ballot public officials or decide any public question lawfully submitted to them.' (Italics supplied.) * * * By defining an 'election' to mean and include any election 'except those held in any school district,' school district elections were entirely excluded from the provisions of the act. The exception extends to all provisions thereof, including those relating to election contests. The subjects embraced in an exception clause are exempt from the operation of the statute. State, by Ervin, v. Goodman, 206 Minn. 203, 208, 288 N. W. 157."

The appellees in the instant case had no cause of action by way of election contest. An election that can be contested by virtue of section 32-1001, R. R. S. 1943, does not include the voting by the legal voters of a school district, at an annual meeting, upon the proposition of contracting for instruction of pupils.

In this connection, it is stipulated and agreed that the appellees are residents and taxpayers of school district No. 54. The contracting by defendants for the instruction of pupils of school district No. 54 by school district No. 2 was beyond the power conferred by the Legislature by section 79-486, R. S. Supp., 1955, and was illegal, as was the action of the president and the treasurer in executing the contract on behalf of school district

No. 54. See Fulk v. School District, *supra*.

In Solomon v. Fleming, 34 Neb. 40, 51 N. W. 304, this court held: "A court of equity will, on the application of resident taxpayers, restrain public officers from doing an illegal act where the effect of such act, if consummated, would be a waste of public funds raised by taxation." See, also, McLain v. Maricle, 60 Neb. 353, 83 N. W. 85; Lindeman v. Corson, 93 Neb. 548, 141 N. W. 153.

In Roberts v. Thompson, 82 Neb. 458, 118 N. W. 106, this court held: "In an action instituted by a resident taxpayer, a court of equity will restrain public officers from illegally creating a debt or obligation which must be paid by taxation." See, also, Martin v. City of Lincoln, 155 Neb. 845, 53 N. W. 2d 923.

We believe that in the light of the authorities cited the appellees were entitled to resort to injunctive process to have the performance of the contract here involved enjoined.

The votes of Joseph P. Dolan, Kathryn Dolan, Harry W. Frey, and Mildred M. Frey, which were cast in favor of the proposition heretofore set out, were illegal votes. These four votes must be discounted. By not counting these four illegal votes, the result of the voting at the annual meeting of school district No. 54 on June 11, 1956, changed the voting on the proposition heretofore mentioned from 15 in favor and 12 against such proposition, to 11 in favor and 12 against the proposition. As a result of the election, the school board of school district No. 54 was not authorized by a majority of the votes cast at the annual meeting to contract with school district No. 2 for the instruction of the pupils of school district No. 54 for the 1956-1957 school year. There was a failure to comply with section 79-486, R. S. Supp., 1955. The school board of school district No. 54 was not authorized or empowered to enter into such contract, and the contract so entered into was beyond the power conferred by the Legislature and was void. Fulk v. School District, *supra*.

For the reasons given in this opinion the judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

AMOS M. SEARS, APPELLEE AND CROSS-APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT AND CROSS-APPELLEE.
83 N. W. 2d 857

Filed June 28, 1957. No. 34172.

1. **Workmen's Compensation: Appeal and Error.** An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo on the record.
2. **Workmen's Compensation.** The burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by him in an accident arising out of and in the course of his employment.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Affirmed.*

Edward F. Fogarty, Bernard E. Vinardi, Neal H. Hilmes, and *Irving B. Epstein,* for appellant.

Edward T. Hayes, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action by Amos M. Sears, plaintiff and appellee, against the City of Omaha, a municipal corporation, defendant and appellant, to recover workmen's compensation on account of an accidental injury alleged to have been sustained by the plaintiff growing out of and in the course of employment by the city. The action was tried first to one judge of the workmen's compensation court. In that court an award was rendered in favor of the plaintiff. By the award the plaintiff was

granted temporary total disability compensation for 49 4/7 weeks at the rate of $28 a week, for 38 1/7 weeks of which the plaintiff had at the time been paid, and compensation for 15 percent permanent partial disability payable at the rate of $28 a week for 32¼ weeks. From the award an appeal was taken by the defendant to the district court. On the trial in the district court the award of the workmen's compensation court was affirmed and a decree was accordingly rendered. In addition an attorney's fee in the amount of $300 was taxed in favor of plaintiff and against the defendant.

Two motions for new trial were duly filed and overruled. From the decree and the order overruling the motions for new trial the defendant has appealed. The plaintiff has presented a cross-appeal.

The assignments of error set forth by the defendant are numerous but they may be summarized as follows: The decree is contrary to law; it is contrary to the evidence; and the allowance of an attorney's fee was improper.

The only assignment of error set forth by plaintiff is that the allowance for permanent partial disability was insufficient and contrary to evidence and to law.

The defendant's first assignment of error requires no separate consideration since no legal impediment to the right of the plaintiff to receive what has been awarded in this action is urged except that which inheres in the controversy as to whether or not the evidence is sufficient to sustain the decree. Attention will therefore be directed to the cause of action as presented by the pleadings and the evidence of the parties in relation thereto.

On December 8, 1955, the plaintiff filed a petition in the Nebraska Workmen's Compensation Court wherein he alleged in substance that on or about February 7, 1955, he was employed by the defendant and while removing snow from a truck, the truck was struck by another truck causing the first truck to strike the left leg and knee of plaintiff whereby he received injuries

and serious disability for which he was entitled to benefits under the Nebraska workmen's compensation law.

To the extent necessary to state here, the defendant denied the allegations of the petition. The case was tried on the issues thus joined by the workmen's compensation court. The issues presented to the district court were in all substantial particulars the same. The case comes here for consideration de novo on the record made in the district court. "An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record." Jones v. Yankee Hill Brick Manuf. Co., 161 Neb. 404, 73 N. W. 2d 394.

In support of his cause of action the plaintiff testified that about 2 a. m. on February 6, 1955, he was employed by the defendant and at the time he was spotting trucks which were hauling snow to a dump at a location in the east part of Omaha; that in the performance of his duties he was required to stand back of trucks and rake residual snow with a long-handled instrument from the interior thereof; that while raking snow from the truck and while standing on snow which was piled behind the truck, the height of which was uncertain but which at the trial in the workmen's compensation court the plaintiff estimated at about 10 inches, another truck backed into the front end of the truck behind which plaintiff was working, the result of which was that he was caused to be knocked down and injured; that the point of contact with him was in the vicinity of or above his left knee; that he got up and walked to a bonfire probably from 100 to 200 feet away where he remained for a short time when he was first taken in a truck to a place called an office and from there to the county hospital by a special policeman; that in consequence of what happened he suffered pain in the left knee; that the knee began to swell and was swollen when he arrived at the hospital; that he was examined, directed to report to a city physician, and taken to a point near where he was living from which place he

walked the rest of the way home; that he did not report to the doctor because of pain and suffering until February 8, 1955, on which date he was examined; and that he suffered continuous pain and complete disability in the knee thereafter. He gave other evidentiary details but this is a summary of his testimony which is important for the purposes of the determination herein. Two witnesses in the case corroborated the testimony of the plaintiff that the one truck backed into the other. There is no evidence to the contrary.

It must be said therefore that the plaintiff sustained the burden of showing that he was the victim of an accident which came upon him within and growing out of his employment by the defendant.

In the light of this and the issues being tried the next question is that of whether or not the plaintiff has sustained the burden of showing that he sustained the injury claimed, the extent thereof, and if so, what compensation he was and is entitled to receive in consequence thereof.

The record of the evidence discloses that on February 8, 1955, the plaintiff went to the office of the city physician heretofore referred to who made an examination. He found the muscle on the left knee tender and rigid and evidence of pain. He saw plaintiff on February 10, 12, and 14, 1955. On February 14, he strapped and bandaged the knee. On March 11, 1955, he referred plaintiff to a specialist in orthopedic surgery. An Ace bandage was applied and on April 2, 1955, a plaster cast was applied. The doctors suspected a loose cartilage in the knee and on June 9, 1955, an operation was performed on the knee and medial cartilage about 3 inches long and ½ inch wide was removed. The knee was kept in a bandage and in September 1955 diathermy was prescribed. The city physician gave it as his opinion at the trial that the plaintiff had permanent partial disability, a part of which resulted from the cartilaginous condition and part from arthritic change, of from 15

percent to 20 percent. This is a summary of evidence given by the city physician who was a witness for the defendant.

The orthopedic surgeon testified that in his opinion there was 10 percent disability resulting from the cartilaginous condition. He said that there was other disability due to arthritis. He gave no estimate as to the percentage of this. This witness was also a witness for the defendant. Neither of these witnesses testified that there would have been any actual disability flowing from the arthritic condition in the absence of the cartilaginous condition.

An orthopedic surgeon was called and testified on behalf of the plaintiff. He had examined the plaintiff for the purpose of preparing himself to become a witness. He testified that in his opinion the permanent partial disability amounted to about 50 percent. It is established therefore that following the accident in question and at the time of trial the plaintiff had an injury to his left knee as the result of which he had permanent partial disability in some amount.

In the light of the disparity of the opinions of the medical men it becomes necessary to say that the character and quality of the condition of plaintiff may not be arrived at here with certainty. However in the light of the fact that the defendant's doctors had the better and more intimate opportunity for diagnosis, analysis, and evaluation the inclination is to say, as did the district court and the workmen's compensation court, that the permanent partial disability is 15 percent.

As to whether or not the plaintiff was totally disabled for 49 4/7 weeks from and after February 6, 1955, the conclusion reached is that the evidence preponderantly sustains the contention that he was. These conclusions effectually dispose of the cross-appeal, except for the comments which will be made hereinafter with regard to terms of the award of the workmen's compensation

court which were repeated in and approved by the decree of the district court.

The next question to be considered, which of course is vital in the determination of the case, is that of whether or not the injury which has been established flowed from the accident which has been described. The defendant insists that it did not. The plaintiff insists that it did.

To support his contention the plaintiff testified that he had sustained no injury to and suffered no disability in the knee prior to the accident and that the condition of his knee directly followed the accident. As to the period from the date of the accident to the time of trial he described his condition and activities and, without summarizing this evidence, if it is taken as true, he suffered such pain and disability as to prevent him from pursuing any gainful occupation for at least the period for which total disability compensation was allowed. The doctors called as witnesses by the defendant, it is apparent, assumed over a period of months that the condition of the knee as described by plaintiff resulted from the accident. This assumption appears to have been based upon the history of the case which they possessed.

Against this it was shown that the plaintiff had suffered injuries in other previous employment accidents but it was not shown that the plaintiff ever had a previous injury to his left knee.

The defendant attempted by evidence of measurements and photographs applied to physical facts, the testimony of the plaintiff given at the trial in the district court and the workmen's compensation court, the opinion of the orthopedic surgeon, and argument, to demonstrate deductively that the accident, if it happened, could not have produced the injury to plaintiff's knee.

The complete premise does not require restatement here. One of its elements and attendant fallacies however will be mentioned as an illustration. It is that the plaintiff when struck fell directly backward, and thus

the type of injury suffered by the plaintiff could not have resulted since such injuries are produced by twisting of the knee. The fallacies are that there was no fixed description of the fall, and the defendant's orthopedic surgeon said only that they are usually produced by a twisting. He did not rule out such an injury from a direct fall.

This it is thought is a fair résumé of the evidence of probative value on the question of whether or not the condition of plaintiff's knee was caused by the accident which occurred on February 6, 1955. It preponderantly shows that it was.

In the light of what has been said it appears that the elements necessary to sustain a recovery by plaintiff of workmen's compensation from the defendant have been established. The applicable rule as to proof sufficient to sustain an award of workmen's compensation, as follows, has been met by the plaintiff: "The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment." Miller v. Livestock Buying Co., 157 Neb. 51, 58 N. W. 2d 596. See, also, Hammond v. Doctor's Hospital, 145 Neb. 446, 17 N. W. 2d 9; Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379.

As pointed out the plaintiff was awarded compensation for temporary total disability for 49 4/7 weeks with a rate based upon his wage of $28 a week. The award was for 15 percent permanent partial disability thereafter or $28 a week for 32¼ weeks. The correctness of the computation has not been brought into question.

The conclusion therefore is that the record sustains the right of plaintiff to recover workmen's compensation from the defendant for the period and in the amount provided by the decree of the district court.

The remaining question for consideration is that of whether or not an attorney's fee should be allowed in

favor of plaintiff's attorney and taxed against the defendant. Nothing convincing has been advanced as a reason why a fee should not have been allowed.

Clearly under section 48-125, R. R. S. 1943, this is a case authorizing the allowance of a reasonable fee. In this case the trial extended over 3 days and into a 4th. In this light it may not well be said that a fee of $300 was unreasonable. The assignment is without merit.

The decree of the district court is affirmed. An attorney's fee in the amount of $300 is allowed in favor of plaintiff to be taxed as costs against the defendant.

AFFIRMED.

DONALD A. STEWART, APPELLEE, V. L. N. RESS, STATE ENGINEER OF THE STATE OF NEBRASKA, ET AL., APPELLANTS.
83 N. W. 2d 901

Filed June 28, 1957. No. 34196.

1. Criminal Law. An accused, by making a plea of guilty, waives all defenses except that the complaint or information is not sufficient to charge an offense.
2. ———. A plea of guilty accepted by the court is a conviction or the equivalent of a conviction of the highest order. The effect of it is to authorize the imposition of a sentence prescribed by law on a verdict of guilty of the crime charged.
3. Automobiles. It is the duty of the Director of Motor Vehicles, when it is disclosed by the records of his office that the holder of a license to operate a motor vehicle in this state has accumulated 12 or more points within any 2-year period, to revoke the license of such person for a period of at least 1 year from the date of his last conviction.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Reversed and remanded with directions.*

Clarence S. Beck, Attorney General, and *Ralph D. Nelson,* for appellants.

Stewart & Stewart and *Raymond K. Calkins,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

The object of this litigation is to secure an adjudication that the order of revocation made on September 26, 1956, by L. N. Ress, as the Director of Motor Vehicles, of the license issued to appellee authorizing him to operate a motor vehicle in Nebraska was void; to obtain a restraining order and an injunction; and general equitable relief.

Appellee asserted that the action taken in that regard by L. N. Ress as Director of Motor Vehicles, hereafter referred to as appellant, was unauthorized and ineffective because his files and records did not contain sufficient proof as specified by law to authorize him to suspend or revoke the license of appellee and that the files and records of the office of appellant did not disclose that appellee had accumulated a total of 12 or more points as described in the point system of the state dealing with traffic violations. §§ 39-7,128 to 39-7,133, R. S. Supp., 1955. It was alleged that the files and records of appellant did show that the conviction for speeding on March 13, 1956, was of a person named Donald H. Stewart whereas the name of appellee is Donald A. Stewart and he has not been known by nor has he used the name of Donald H. Stewart; that the conviction for speeding on July 23, 1956, was of the holder of motor vehicle operator's license No. J2-1901 L whereas the driver's license of appellee was on that date No. J2-190 16; and that the alleged convictions on March 13, 1956, July 23, 1956, and September 11, 1956, were for speeding but evidence is lacking that the convictions were for speeding in violation of a municipal ordinance or statutory prohibition as is required by statute.

The hearing of the application of appellee for a restraining order was set by the district court for 10 a. m., October 20, 1956. The order revoking the license

of appellee was canceled by appellant October 19, 1956. A second order of revocation of the license of appellee was made on that date and notice thereof to appellee was then mailed to him. Appellee and his counsel learned from the attorney for appellant of the cancellation of the first order of revocation and the making of the second when they appeared for the hearing on October 20, 1956. Appellee filed a supplemental petition asserting reasons why the second order of revocation of his license was void. This order of revocation was canceled by appellant December 3, 1956. A third order of revocation of the license of appellee for 1 year from September 11, 1956, was made December 3, 1956, and notice thereof was given to appellee on December 4, 1956.

The answer of appellant to the petition of appellee, filed November 19, 1956, contained a denial and an allegation that appellant made an order October 19, 1956, revoking the license of appellee and notice thereof was given him October 20, 1956; and that appellee surrendered his license to appellant on demand therefor October 1, 1956.

The cause was tried to the district court December 12, 1956, on the petition of appellee, the answer of appellant, and the supplemental petition of appellee. There was no mention in the pleadings at that time of the order of revocation of the license of appellee made on December 3, 1956. At the conclusion of the trial on December 12, 1956, the court gave appellant leave to make answer to the supplemental petition which was done on December 19, 1956, and permission to appellee to reply to the answer of appellant which was done on December 29, 1956.

The answer of appellant to the supplemental petition alleged that appellant revoked the license of appellee December 3, 1956, by authority of section 39-7,129, R. S. Supp., 1955, because he had been convicted of speeding on July 7, 1955, in violation of section 39-723, R. R. S.

1943, in the justice of the peace court in Fairbury; on March 13, 1956, in violation of a city ordinance of the city of Lincoln in the municipal court of that city; on July 24, 1956, in violation of an ordinance of the city of North Platte in the police court of that city; and on September 11, 1956, in violation of a city ordinance of the city of Lincoln in the municipal court of that city. The answer further alleged that appellee pleaded guilty to each of the charges of speeding as aforesaid and that he surrendered his license to appellant on his demand therefor on October 1, 1956. Appellee by reply denied the new matter of the answer of appellant.

The district court found generally for appellee, granted an injunction enjoining appellants from retaining the license of appellee or from interfering with his use and enjoyment of it, ordered appellants to return the license to appellee and to expunge from the records of the Director of Motor Vehicles any showing appearing therein concerning any of the alleged four convictions of appellee for speeding, and set aside and annulled the action taken by appellants in reliance on the four alleged convictions of appellee for speeding. A motion for a new trial was denied. The subject of this appeal is the judgment and denial of a new trial.

The material circumstances of this case are few. There is no conflict of evidence concerning them. The record contains proof to this effect:

Appellee was charged in the justice of the peace court in Fairbury, Nebraska, with operating a motor vehicle on June 24, 1955, at a speed in excess of that allowed by and in violation of section 39-723, R. R. S. 1943. A hearing thereon was had July 7, 1955. Appellee pleaded guilty to the charge and was sentenced to pay a fine and the costs.

Appellee was charged in the municipal court of Lincoln, Nebraska, with operating a motor vehicle within the city of Lincoln on March 3, 1956, at a greater speed than 25 miles per hour, contrary to and in violation of

an ordinance of the city regulating speed of motor vehicles therein. A hearing of the complaint was had on March 13, 1956. Appellee pleaded guilty to the charge and was adjudged to pay a fine and costs which he paid on that date.

Appellee was charged in the police court of the city of North Platte, Nebraska, with operating a motor vehicle on July 23, 1956, within that city at a greater speed than allowed by and in violation of an ordinance of that city regulating the speed of motor vehicles therein. A hearing of the matter was had on July 24, 1956. Appellee pleaded guilty to the charge and was adjudged to pay a fine and costs.

Appellee was charged in the municipal court of the city of Lincoln, Nebraska, with operating a motor vehicle within the city of Lincoln on September 4, 1956, at a greater speed than 25 miles per hour, contrary to and in violation of an ordinance of the city regulating the speed of motor vehicles therein. A hearing concerning the charge was had on September 11, 1956. Appellee pleaded guilty to the charge and was adjudged to pay a fine and costs which he paid on that date.

Appellee does not contend in this litigation that he was not charged with the four offenses above described or that he did not plead guilty to each of them or that he was not in each instance adjudged to pay and did pay a fine and the costs. He admitted the first conviction described above by the allegation in his petition: "That at the time of the first conviction of this plaintiff as set forth in the attached notice * * *." He inferentially concedes that he was charged with and arrested for the four offenses for speeding described herein by the part of his supplemental petition in which he says: "Plaintiff has not been arrested for or charged with any of the violations set forth in Section 39-7,128, Revised Statutes of Nebraska, 1955 Cumulative Supplement * * * other than those set forth in the original notice sent to him by defendants, a copy of which is attached to

the petition * * *." The plea of guilty to each of the charges made by appellee was the equivalent of a conviction by trial and verdict or a finding of guilt by the court.

Accused, by making a plea of guilty, waives all defenses except that the complaint or information is not sufficient to charge an offense. Such a plea makes a jury trial or any trial unnecessary. A plea of guilty accepted by the court is a conviction or the equivalent of a conviction of the highest order. The effect of it is to authorize the imposition of the sentence prescribed by law on a verdict of guilty of the crime charged. Martin v. Sanford, 129 Neb. 212, 261 N. W. 136, 100 A. L. R. 179; Duggan v. Olson, 146 Neb. 248, 19 N. W. 2d 353, certiorari denied 327 U. S. 790, 66 S. Ct. 803, 90 L. Ed. 1016; Taylor v. State, 159 Neb. 210, 66 N. W. 2d 514; Lingo v. Hann, 161 Neb. 67, 71 N. W. 2d 716.

Each conviction of appellee for speeding in violation of a city ordinance or a statute of the state amounted, under the point system for dealing with traffic violations, to 3 points and a total of 12 points for the four convictions. § 39-7,128, R. S. Supp., 1955. Evidence of the convictions of appellee as recited above was certified to the Director of Motor Vehicles and when it came to his attention that appellee had accumulated a total of 12 points within a 2-year period it was the duty of appellant to revoke the license of appellee to operate a motor vehicle in the state for a period of 1 year from September 11, 1956, the date of the last conviction. § 39-7,129, R. S. Supp., 1955; Durfee v. Ress, 163 Neb. 768, 81 N. W. 2d 148. This was a duty, ministerial in character, required to be performed by appellant. § 39-796, R. S. Supp., 1955.

This is an action for injunction. It is an indirect or collateral challenge of the administrative act of appellant in revoking the license of appellee. The statutes provide for a direct attack on such an act by an appeal to the district court for the county of the residence

of the licensee. § 39-7,130, R. S. Supp., 1955; § 60-420, R. R. S. 1943. Appellee did not choose to pursue a direct attack on the order of the director by appeal. The order of revocation of the license of appellee of December 3, 1956, is valid and effective. The license of appellee to operate a motor vehicle was surrendered to appellant because of his demand for it October 1, 1956, and he retained it until December 29, 1956, when it was returned to appellee. Appellee was thereby wrongfully and without authority of law deprived of his license and its use and enjoyment for 2 months and 29 days.

The judgment should be and it is reversed and the cause is remanded with directions to the district court for Lancaster County to render a judgment herein dismissing the petition of appellee; sustaining the order of revocation of the license of appellee of December 3, 1956, involved in this case; requiring appellee to surrender his license to operate a motor vehicle to appellant; and adjudicating that the period of revocation of the license remaining shall be 9 calendar months and 2 days from and after the rendition of a judgment as herein described. The cost of this appeal should be taxed to appellee.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., participating on briefs.

INDEX

Actions.

1. An action may be maintained by a next friend when the person in whose behalf the action is commenced is not insane but is incapable of managing his affairs, has not been adjudged to be incompetent, and has no appointed guardian. *Fiala v. Tomek* 20
2. The expression "in their proper persons" in statute regulating practice of law is derived from the Latin "in propria persona" and means in their own persons. *Niklaus v. Abel Construction Co.* 842
3. As a general rule a plaintiff cannot join an individual cause of action and a representative cause of action. *Niklaus v. Abel Construction Co.* 842
4. Proceedings in a suit by a person not entitled to practice are a nullity, and the suit may be dismissed. *Niklaus v. Abel Construction Co.* 842

Adverse Possession.

1. The title to land becomes complete in the occupant by adverse possession when he and his grantors have maintained an actual, exclusive, open, and continuous possession thereof, claiming title to the same against all persons, for 10 years. *James v. McNair* 1
2. The law does not require that possession shall be evidenced by a complete enclosure, nor by persons remaining continuously upon the land and constantly from day to day performing acts of ownership thereof. It is sufficient if the land is used continuously for the purposes to which it may be in its nature adapted. *James v. McNair* 1
3. When a fence is constructed as a boundary line fence between two properties, and where the parties claim ownership of the land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own. *James v. McNair* 1

Appeal and Error.

1. On proper showing that bill of exceptions was

timely settled and allowed, Supreme Court will vacate judgment of affirmance and permit correction of record. *Bryant v. Greene* 15

2. In an appeal from an order directing a verdict and dismissing an action, the party against whom the verdict was directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. *Bryant v. Greene*.... 15

3. Rule for trial of equity case de novo stated. *Fiala v. Tomek* 20

4. When a trial court sustains a motion for judgment notwithstanding the verdict, the party against whom it is sustained is entitled on appeal to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. *Holliday v. Patchen* 53

5. In a proceeding in error to reverse the action of the county superintendent in creating a new district or changing the boundaries of an existing district affecting a city, village, or Class III school district, the board of education is the real party in interest. *Clausen v. School Dist. No. 33* 78

6. In a proceeding in error to reverse the action of the county superintendent in creating a new district or changing the boundaries of existing districts in case of changes affecting districts other than city, village, or Class III school districts, the petitioners who signed the petitions for change of boundaries or new district creation are the real parties in interest. *Clausen v. School Dist. No. 33* 78

7. In a proceeding in error the summons must be served upon the real party or parties in interest or the attorney of record of the defendant or defendants in error, unless the issuance or service is waived in writing by the attorney or the defendants. *Clausen v. School Dist. No. 33* 78

8. In a proceeding in error all necessary parties must be made parties to the proceeding. *Clausen v. School Dist. No. 33* 78

9. All parties to a joint judgment are necessary parties to a proceeding in error brought to reverse such judgment. *Clausen v. School Dist. No. 33* 78

10. The failure to make all parties who may be affected by the modification or reversal of a judgment in a proceeding to review the cause by petition in error

is ground for dismissal of the petition. *Clausen v. School Dist. No. 33* 78

11. One necessary party who has been properly served with summons in a proceeding in error may properly move for dismissal of the petition for failure to make others parties to the proceeding. *Clausen v. School Dist. No. 33* 78

12. In the absence of a bill of exceptions, it will be presumed that an issue of fact presented by the pleadings was established by the evidence and that it was correctly decided. The only question that will be considered on appeal is the sufficiency of the pleadings to support the judgment. *Combes v. Anderson* 131

13. In an equity case tried to the court, the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant. The Supreme Court on appeal will not reverse a judgment in a case so tried because other evidence was introduced when there is relevant and competent evidence in the record to sustain the judgment of the trial court. *Koehn v. Koehn* 169

14. Report of pre-trial hearing need not be offered in evidence or included in bill of exceptions. *Powell v. Farmers State Bank* 180

15. Under the Revised Rules of the Supreme Court, assignments of error relied upon for reversal and intended to be urged are required to be separately numbered and paragraphed. *Romans v. Bowen* 209

16. Ordinarily only errors separately numbered and paragraphed and which have been discussed will be considered on review by the Supreme Court. *Romans v. Bowen* 209

17. The Supreme Court may, at its option, notice plain errors not assigned. *Romans v. Bowen* 209

18. On appeal to the Supreme Court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265

19. Upon appeal to the Supreme Court from a decision of the railway commission involving charges of a railway company or other common carrier, the rates fixed by the commission will be considered

prima facie just and equitable. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265
20. In a law action where a jury has been waived, findings of fact upon conflicting evidence will not be disturbed unless clearly wrong. *Capital Bridge Co. v. County of Saunders* 304
21. Where all the instructions given by the trial court disclose that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon. *Bezdek v. Patrick* 398
22. The question of the amount of damage is one solely for the jury. Its action will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved. *Bezdek v. Patrick* 398
23. The verdict of a jury based upon conflicting evidence will not be disturbed on appeal unless it is clearly wrong. *Bezdek v. Patrick* 398
State v. Hohensee 476
24. An order of the district court sustaining a demurrer to a cause of action and dismissing it, either with or without prejudice, is a final order and is appealable. *Akins v. Chamberlain* 428
25. Time and manner of perfecting an appeal to the Supreme Court stated. *Akins v. Chamberlain* 428
26. On an appeal to the Supreme Court from a judgment of the district court convicting a defendant of a violation of a city ordinance, the existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record. *State v Hohensee* 476
27. On appeal to the Supreme Court from a judgment of the district court convicting a defendant of the violation of a municipal ordinance, it will be presumed, nothing appearing to the contrary, that the facts set out in the complaint constituted a violation of the ordinance of the city. *State v. Hohensee* 476
28. A final judgment is one that disposes of the case either by dismissing it before hearing is had upon the merits, or after trial by rendition of judgment for the plaintiff or defendant. A judgment or order is not final unless it determines the rights of the litigants and precludes further inquiry. *Lindquist v. Towle* 524
29. An order sustaining a demurrer to a petition, with-

out a dismissal or other final disposition of the case, is not a final order reviewable on appeal. *Lindquist v. Towle* 524

30. When on direct examination an objection to a question is interposed by the adverse party and sustained, there must be an offer of proof of the facts sought to be put in evidence by the question in order to present the ruling for review in the Supreme Court. *Parker v. State* 614

31. To make error in a trial available for a reversal in the appellate court it should be called to the attention of the district court and be affirmatively shown on the record for review. *Parker v. State* 614

32. A motion for new trial in a criminal action must be filed within 10 days after the verdict is rendered in order to be considered on appeal, except for the cause of newly discovered evidence or unless the defendant was unavoidably prevented from filing the motion within 10 days. *Parker v. State* 614

33. A judgment will not be reversed for error in overruling a motion for a directed verdict at the close of plaintiff's case when certain essential testimony was not then in the record, when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record, unless its admission is assigned as error in the Supreme Court and the assignment is sustained. *Buhrman v. Smollen* 655

34. Before an error requires a reversal it must be determined that it was prejudicial to the rights of the party against whom it was made. *Buhrman v. Smollen* 655

35. Instructions not complained of in such a way as to be reviewable in the Supreme Court will be taken as the law of the case, and if, when tested by such instructions the verdict is not vulnerable to the objections lodged against it, the assignments will not be sustained. *Buhrman v. Smollen* 655

36. Erroneous instructions to the jury will not cause a reversal of a case unless they are prejudicial to the complaining party. *Buhrman v. Smollen* 655

37. Instructions to a jury must be considered together. If as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof. *Buhrman v. Smollen* 655

38. The Supreme Court will reverse on appeal a decree

of divorce granted on uncorroborated testimony of a party. *O'Neill v. O'Neill* 674
39. A defendant may not predicate error on the admission of evidence to which no objection was made at the time it was offered. *Hoffman v. State* 679
40. In a negligence case, where different minds may reasonably draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence the issues must be submitted to the jury for its determination, and its verdict based thereon will not be disturbed unless clearly wrong. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704
41. In a criminal case, the credibility of witnesses and weight of evidence are for the jury to determine. The verdict of the jury may not be disturbed by the Supreme Court unless it is clearly wrong. *Pew v. State* 735
42. Where the excessive amount in a judgment is subject to exact determination, a remittitur may be required as a condition of affirmance for the correct amount. *Bear v. Auguy* 756
43. By statute and under rules of the Supreme Court, consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned. *Schaffer v. Strauss Brothers* 773
44. On an appeal to the Supreme Court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. *City of Bayard v. North Central Gas Co.* 819
45. An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo on the record. *Sears v. City of Omaha* 869

Assault and Battery.

1. Previous threats to commit an assault and battery are admissible in evidence provided the threats were made in such a manner and at such a time as to have a direct bearing on the assault in question. *Elliott v. Brandt* 790
2. In an action for assault and battery, it is not error to allow plaintiff to be cross-examined fully

in regard to his former relations with the defendant. *Elliott v. Brandt* 790

Attachment.

1. In the absence of malice, an action for the wrongful suing out of an attachment can be maintained alone on the attachment bond. To maintain an action independently of the statute, and not on the bond, malice in suing out the writ and want of probable cause must be averred. *Carlson v. Schroeder* 443
2. An attachment affidavit setting forth the nature of the plaintiff's claim, that the claim is just, the amount which the affiant believes the plaintiff ought to recover, and the existence of one or more statutory grounds for the writ in the language of the statute, is sufficient as a basis for the issuance of the writ. *National Reefer Service, Inc. v. Felman* 783
3. Where an attachment is predicated on two or more claims one or more of which does not properly provide the basis for attachment, the defendant on motion is entitled to have the entire attachment dissolved. *National Reefer Service, Inc. v. Felman* 783
4. Where the facts stated in an affidavit for attachment are denied on a motion to dissolve, the burden is cast upon the plaintiff to sustain the charges contained in the affidavit by proof. *National Reefer Service, Inc. v. Felman* 783
5. Affidavits used at the hearing of a motion to dissolve an attachment will not be considered in the Supreme Court on appeal unless preserved in a bill of exceptions. *National Reefer Service, Inc. v. Felman* 783
6. An attachment may not be dissolved on the ground alone that the debt is not due at the time the action is started. If the plaintiff is entitled to prosecute the case to final judgment, he is entitled to the security afforded by the attachment in the absence of any other ground for dissolution. *National Reefer Service, Inc. v. Felman* 783
7. An action for damages for the breach of the terms of an agreement is an action on the contract within the meaning of attachment statute. *National Reefer Service, Inc. v. Felman* 783
8. The merits of a cause of action will not be adjudicated on a motion to dissolve an attachment. *National Reefer Service, Inc. v. Felman* 783

Attorney and Client.

1. The rules of equity as to fiduciary relations are not restricted to attorney and client, nor to similar conventional relations, but extend to all cases, where, on one hand, confidence is properly reposed, and, on the other, knowledge or authority or influence arises from any cause. *James v. McNair* 1
2. A communication made to an attorney at law, where the relationship of attorney and client does not exist, is not privileged, although the attorney was employed as such in some other capacity. *Beacom v. Daley* 120
3. When two or more persons employ or consult the same attorney in the same matter, communications made by them in relation thereto are not privileged inter sese. *Beacom v. Daley* 120
4. Communications between attorney and client made in the presence of others do not constitute privileged communications within the meaning of the statutory prohibition against divulging same. *Beacom v. Daley* 120
5. Attorney's fees are not allowable in an action for divorce in the absence of statutory authority therefor. *O'Neill v. O'Neill* 674
6. The statutes of this state contain no provision for the allowance of attorney's fees in an action for divorce in favor of a husband and against a wife. *O'Neill v. O'Neill* 674
7. The courts are without authority in an action for divorce to fix the amount of the attorney's fees the parties are to pay their respective attorneys. *O'Neill v. O'Neill* 674
8. An attorney's fee under Small Claims Act was properly denied where a large number of small claims were sought to be recovered on one cause of action. *Schaffer v. Strauss Brothers* 773
9. Courts will not permit laymen to appear in court in a representative capacity and such a rule may not be circumvented by subterfuge. *Niklaus v. Abel Construction Co.* 842
10. While a layman may represent himself in court, he cannot, even on a single occasion, represent another, whether for a consideration or not. *Niklaus v. Abel Construction Co.* 842
11. Proceedings in a suit by a person not entitled to practice are a nullity, and the suit may be dismissed. *Niklaus v. Abel Construction Co.* 842

Automobiles.

1. The subsequent purchaser for value of an automobile who obtains a certificate of title, based upon a previous valid title thereto and compliance with statutory requirements, obtains title and ownership superior to that of a prior purchaser. *Allstate Ins. Co. v. Enzolera* 38
2. A purchaser for value of an automobile who obtains a certificate of title based upon a previous false or fraudulently obtained title obtains no title as against a previous purchaser and holder of a valid certificate of title to the automobile. *Allstate Ins. Co. v. Enzolera* 38
3. If the evidence is undisputed, or such that but one conclusion could reasonably be reached, whether or not a person riding in a motor vehicle is a guest is a matter of law for the court. *Holliday v. Patchen* 53
4. Gross negligence within the meaning of the guest statute is great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty. *Holliday v. Patchen* 53
5. To recover damages from a host for injuries received while riding in an automobile operated by the host, a guest must prove by a preponderance of the evidence the gross negligence relied upon and that it was the proximate cause of the accident. *Holliday v. Patchen* 53
6. The operation of an automobile at a rate of speed prohibited by law is not in itself gross negligence. *Holliday v. Patchen* 53
7. Momentary inattention in the operation of a motor vehicle does not ordinarily amount to gross negligence. This is true even where such inattention is voluntary and in no manner induced by a distracting influence. *Holliday v. Patchen* 53
8. A warning of imminent danger to a host by a guest riding in an automobile operated by such host must be made in time to afford the host a reasonable opportunity to avoid the accident. *Holliday v. Patchen* 53
9. A guest passenger in an automobile has the right to assume the driver thereof is a reasonably safe and careful driver. A duty to warn the driver does not arise until some fact or situation out of the

usual and ordinary is presented. *Burhoop v. Bracken* 382

10. Where the negligence of the driver of an automobile is the sole proximate cause of a collision in which a guest is injured, the guest cannot recover from a third person for such injury. *Burhoop v. Bracken* 382

11. A motorist entering an intersection from the right has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored car to exercise ordinary care. *Burhoop v. Bracken* 382
Bezdek v. Patrick 398

12. The duty of the driver of an automobile about to enter a street intersection to look for automobiles approaching the same intersection implies the duty to see that which is in plain sight, unless some reasonable excuse for not seeing is shown. *Burhoop v. Bracken* 382

13. A driver of a motor vehicle about to enter a highway protected by stop signs must stop, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection. *Bezdek v. Patrick* 398

14. The violation of traffic regulations is not negligence as a matter of law of any kind or degree, but it is a fact to be considered with the other evidence in the case in deciding an issue of negligence. *Bezdek v. Patrick* 398

15. Duty of driver of a motor vehicle approaching a through street or highway stated. *Bezdek v. Patrick* 398

16. A person traveling a favored street protected by a stop sign, of which he has knowledge, may properly assume that oncoming traffic will obey it. *Bezdek v. Patrick* 398

17. A user of the highways may assume that other users of the highways will use them in a lawful manner, and until he has warning, notice, or knowledge to the contrary, he is entitled to govern his actions in accordance with such assumption. *Bezdek v. Patrick* 398

18. Upon entering an intersection, a motorist should have his motor vehicle under such control that he can avoid a collision with another vehicle which is operated with due care. *Bezdek v. Patrick* 398

19. The right of a motorist on an arterial highway to assume that a motor vehicle on a nonfavored intersecting street will be brought to a stop before entering the intersection does not permit him to claim the right-of-way when too far from the intersection to be entitled thereto. *Bezdek v. Patrick* 398
20. The question of the admissibility of evidence as to the speed of a motor vehicle shortly prior to the time of an accident rests largely in the discretion of the court. *Buhrman v. Smollen* 655
21. When the speed of a motor vehicle is charged as negligence, it is proper to admit competent evidence of the speed at which it was being driven a few seconds before the collision. *Buhrman v. Smollen* 655
22. An owner of a garage with whom a motor vehicle is left by its owner for repairs or to be serviced is a bailee for hire or for mutual benefit and is required to exercise ordinary care for the safekeeping of the vehicle. *Federal Ins. Co. v. International Harvester Co.* 698
23. Physical facts are sufficient to warrant a directed verdict in an automobile collision case when they conclusively demonstrate that the collision out of which the injuries arose was not caused by any negligence on the part of the party making the motion. Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704
24. Testimony as to tire marks on the highways is admissible in civil actions for injury or damage where a sufficient foundation therefor is laid. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704
25. The lawfulness of the speed of a motor vehicle within the prima facie limits fixed by statute is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing. *Bear v. Auguy* 756
26. A driver is required to have his motor vehicle under such reasonable control as will enable him to avoid a collision with other vehicles, assuming that the drivers thereof will exercise due care. *Bear v. Auguy* 756
27. Duty of motorist with respect to keeping a proper lookout stated. *Bear v. Auguy* 756
28. It is the duty of the Director of Motor Vehicles,

when it is disclosed by the records of his office that the holder of a license to operate a motor vehicle in this state has accumulated 12 or more points within any 2-year period, to revoke the license of such person for a period of at least 1 year from the date of his last conviction. *Stewart v. Ress* 876

Bailments.

1. An owner of a garage with whom a motor vehicle is left by its owner for repairs or to be serviced is a bailee for hire or for mutual benefit and is required to exercise ordinary care for the safekeeping of the vehicle. *Federal Ins. Co. v. International Harvester Co.* 698
2. A bailee of a chattel for the mutual benefit of the parties to the bailment or for hire, in the absence of an express contract, is liable to the bailor only for any loss resulting from the negligence of the bailee. *Federal Ins. Co. v. International Harvester Co.* 698
3. In an action by a bailor to recover for damage done by fire to the subject of such a bailment while in the custody of the bailee, a petition which does not allege that negligence of the bailee was the proximate cause of the damage does not state a cause of action. *Federal Ins. Co. v. International Harvester Co.* 698

Banks and Banking.

1. Statute declaring effect of joint bank deposit was intended for the protection of banks but it also establishes the property rights of the persons described therein unless the contrary is expressed by the terms of the deposit. *Slocum v. Bohuslov* 156
2. If a deposit is made in a bank payable to two persons, either expressly as joint tenants with right of survivorship or without those or similar qualifying words, upon the death of one of the co-owners of the deposit it becomes the sole property of and is payable to the surviving co-owner. *Slocum v. Bohuslov* 156
   Nelson v. Rasmussen 274
3. A certificate of deposit made payable on the return of the certificate properly endorsed with no other stipulation fixing a specified or determinable future time after date for payment thereof is a demand

certificate and the statute of limitations does not begin to run thereon until demand for payment is made. *Powell v. Farmers State Bank* 180

4. A certificate of deposit made payable on the return of the certificate properly endorsed at specified or determinable future time after date is a time certificate and the statute of limitations begins to run thereon at the expiration of such time without the necessity of any demand for payment. *Powell v. Farmers State Bank* 180

5. Statute regulating deposits payable to two persons was intended for the protection of banks but it also establishes the property rights of the persons described therein unless the contrary is expressed by the terms of the deposit. *Nelson v. Rasmussen* 274

6. A joint deposit in a bank in the name of two persons is not, upon the death of one of them, conclusive of the ownership of the deposit by the surviving co-owner as between him and a third person who claims that the surviving owner holds the legal title to the deposit in trust for the third party. *Nelson v. Rasmussen* 274

Bills and Notes.

1. It is deemed prima facie (1) that every negotiable instrument has been issued for a valuable consideration, and (2) that every person whose signature appears thereon has become a party thereto for value. *Leach v. Treber* 419

2. In an action on a promissory note, the party alleging want of consideration has the burden of proving it by a preponderance of the evidence. *Leach v. Treber* 419

3. A promissory note is supported by a valid consideration if the transaction confers a benefit upon the promisor or causes a detriment to the promisee. Either is a valid consideration which will support a contract. *Leach v. Treber* 419

4. In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them. *Leach v. Treber* 419

5. Retention for more than 24 hours by a bank of a check forwarded to it for collection and payment does not render the bank liable as an acceptor under

the Negotiable Instruments Law. *Urwiller v. Platte Valley State Bank* 630

Cancellation of Instruments.

Equity may decree cancellation or rescission of a contract for fraud or misrepresentation constituting an inducement to its execution, especially when the legal remedy is inadequate or the equitable relief by way of cancellation is more complete. *Caruso v. Moy* 68

Carriers.

1. At common law, a common carrier is one that holds itself out to the public as a carrier always open to employment for the transportation of persons or freight, and that it will carry for all persons indiscriminately. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85
2. Carriage for all persons indiscriminately is implicit in the statutory definition of a common carrier. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85
3. The lowest rates published or charged by any railway company for substantially the same kind of service, whether in this or another state, shall, when introduced in evidence, be accepted as prima facie evidence of a reasonable rate for the service under investigation. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265
4. A statute specifically authorizes the railway commission to put into effect certain rates when an emergency exists. The commission, in doing so, exercises its legislative authority to regulate rates, to declare an emergency, and to prescribe the time when such rates shall become effective. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265
5. Where the railway commission specifically adopts the rates and charges fixed by the Interstate Commerce Commission as its own, they become the regularly fixed rates and charges of the railway commission until altered or set aside. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265
6. Rates and charges duly established by the railway commission, until altered or set aside, have the effect of a legislative enactment. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265

7. It is unjust discrimination or undue preference only, under substantially similar circumstances and conditions, that is unlawful and prohibited. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247
8. A private carrier is one who, without making it a vocation or holding himself out to the public as ready to act for all who desire his services, undertakes by special agreement in a particular instance only to transport property from one place to another either gratuitously or for hire. *City of Bayard v. North Central Gas Co.* 819
9. Operation for hire is a jurisdictional prerequisite to general regulation of a common carrier by the railway commission. Common carrier is defined. *City of Bayard v. North Central Gas Co.* 819

Conspiracy.

1. A civil conspiracy is a combination of two or more persons to accomplish by concerted action (1) an unlawful or oppressive object, or (2) a lawful object by unlawful or oppressive means. *Stillinger & Napier v. Central States Grain Co., Inc.* 458
2. The principal element of a conspiracy is an agreement or understanding between two or more persons to do a wrong to or inflict an injury upon another. It involves action and an intent to commit the act which results in the injury. *Stillinger & Napier v. Central States Grain Co., Inc.* 458
3. A conspiracy, like other facts, may be proved by direct or circumstantial evidence, and one means of proof is by showing overt acts or representations of the individuals charged with conspiracy. *Stillinger & Napier v. Central States Grain Co., Inc.* 458
4. Admissibility of evidence and sufficiency thereof to establish a conspiracy stated. *Stillinger & Napier v. Central States Grain Co., Inc.* 458
5. If a conspiracy between the parties is established, whatever was done in pursuance of it by one conspirator is considered as the act of all. All are liable irrespective of the fact of the extent to which they benefited thereby. *Stillinger & Napier v. Central States Grain Co., Inc.* 458

Constitutional Law.

1. Temporary damage to land caused by the establishment and maintenance of a free dump for the dis-

posal of garbage is such a damage as is required to be compensated by Article I, section 21, of the Constitution. *Patrick v. City of Bellevue* 196

2. Even though city was performing a governmental function and did not create a nuisance, the Constitution requires payment of just compensation for damage to private property for public use by a city. *Patrick v. City of Bellevue* 196

3. The fact that the city is not liable for the negligence of its officers, agents, or employees when the city is engaged in the performance of a governmental function does not exempt it from liability for damage to private property in the exercise of its powers of eminent domain. *Patrick v. City of Bellevue* 196

4. Private property damage by a city for a public purpose without an actual taking thereof is required by the Constitution to be justly compensated. *Patrick v. City of Bellevue* 196

5. It is not indispensable that a constitutional provision be set out or its existence alleged in the statement of a cause of action if the litigant otherwise pleads and proves a right of recovery because of it. *Patrick v. City of Bellevue* 196

6. The prohibition contained in Article XIII, section 3, Constitution of Nebraska, relating to the giving or loaning of credit in aid of any individual, association, or corporation, applies to the State and all political subdivisions thereof. *State ex rel. Beck v. City of York* 223

7. Money derived from the sale of municipal revenue bonds is public money. *State ex rel. Beck v. City of York* 223

8. Public money may not be expended for a private purpose whatever its source may be. *State ex rel. Beck v. City of York* 223

9. The purchase of land by a municipality and the erection of an industrial plant thereon for lease to a private corporation for private gain and profit, by issuing revenue bonds to be paid solely from rentals, is not for a public purpose. *State ex rel. Beck v. City of York* 223

10. Statute authorizing the building and leasing of industrial plants to private concerns for use for private profit or gain, financed by municipal revenue bonds payable solely from rentals, violates

Article XIII, section 3, of the Constitution. *State ex rel. Beck v. City of York* 223

11. The Constitution gives the Legislature exclusive power and authority to divide the state into legislative districts. Annexation ordinances enacted by municipalities do not change the territorial boundaries of legislative districts. *Buller v. City of Omaha* 435

12. When land is taken outside the boundaries of the right-of-way condemned, it constitutes a second taking of private property for a public use and liability attaches therefor under Article I, section 21, of the Constitution. *McGree v. Stanton-Pilger Drainage Dist.* 552

13. In an action for damages based upon Article I, section 21, of the Constitution, against a drainage district organized by vote of landowners for the taking or damaging of private property for a public use, it is not necessary for plaintiff to plead or prove that he filed a notice. *McGree v. Stanton-Pilger Drainage Dist.* 552

14. The right of an owner of property abutting on a street to ingress and egress to and from his premises by way of such street is a property right in the nature of an easement of which he cannot be deprived without due process of law and compensation for his loss. *Hillerege v. City of Scottsbluff* 560

15. The grant by the state to a city of the power to control and improve streets in any manner it deems proper is the delegation of police power to be exercised with a sound discretion in a reasonable and not in an arbitrary or discriminatory manner. *Hillerege v. City of Scottsbluff* 560

16. It is the right of a city, in the exercise of the police power delegated to it in reference to its streets, to determine the action required for the safety, convenience, and welfare of the public. *Hillerege v. City of Scottsbluff* 560

17. The action of a city in the exercise of the police power is not absolute or final but is subject to judicial review. *Hillerege v. City of Scottsbluff* 560

18. The test of the proper exercise of police power is whether or not the action proposed is a good faith, reasonable exercise of the power or is an arbitrary and unreasonable interference with the rights of

persons affected thereby. *Hillerege v. City of Scottsbluff* 560
19. Action taken by a city in the exercise of the police power is presumed to be valid. The burden is on the party contesting its validity to establish by clear and unequivocal proof that it is so unreasonable, arbitrary, or discriminatory as to amount to depriving the party of his property without due process of law. *Hillerege v. City of Scottsbluff* 560
20. Municipal action, in the exercise of the police power, is not necessarily invalid because it infringes on private rights or property but such infringement may not be unreasonable, discriminatory, or confiscatory. *Hillerege v. City of Scottsbluff* 560
21. It is a denial of equal protection of the law to apply a regulation differently to different persons under the same or similar circumstances. *Hillerege v. City of Scottsbluff* 560
22. Municipal action applicable to all persons affected thereby within the area described is not discriminatory. *Hillerege v. City of Scottsbluff* 560
23. It is the function of the county board of equalization to determine the actual value of property for tax purposes and give effect to the constitutional requirement that taxes be levied uniformly and proportionately upon all taxable property. *S. S. Kresge Co. v. Jensen* 833
24. Uniformity and proportionate taxation is a constitutional requirement, and prevails over statutory requirement that property be assessed at its actual value. *S. S. Kresge Co. v. Jensen* 833
25. The Constitution of this state vests all matters pertaining to schools and school districts, and their creation, dissolution, government, and control, in the Legislature. In all such matters the state is supreme. *Farrell v. School Dist. No. 54* 853

Contracts.

1. The rescission of a contract must be in toto and the parties must be placed in status quo as far as the circumstances will permit. *Caruso v. Moy* 68
2. There can be no rescission of a contract unless the parties can be placed in status quo, or substantially so. *Caruso v. Moy* 68
3. The right to rescind a contract for fraud or breach of covenant is barred by failure of the one

party, for an unreasonable time after knowledge of the facts giving rise to such right, to declare a rescission and disclaim the benefits of the contract. *Caruso v. Moy* 68

4. A consideration for a promise may be a detriment to the promisee as well as a benefit accruing to the promisor. *Reed v. Williamson* 99

5. A United States savings bond is a contract between the federal government and the purchaser. Treasury Department regulations governing such bonds are incorporated into the contract by reference and are beyond the reach of state law to modify or destroy. *Slocum v. Bohuslov* 156
Nelson v. Rasmussen 274

6. If a United States savings bond is registered in the names of two persons as co-owners, the rights of the surviving co-owner arise solely by contract. *Slocum v. Bohuslov* 156
Nelson v. Rasmussen 274

7. A surviving co-owner of a United States savings bond takes title thereto as sole owner by reason of Treasury Department regulations incorporated in the contract between the federal government and the purchaser of the bond. *Slocum v. Bohuslov* 156
Nelson v. Rasmussen 274

8. To establish an express contract there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof. *Griggs v. Oak* 296

9. To constitute a contract, an offer must be accepted as made. There must be no substantial variation between the offer and the acceptance. If the acceptance differs from the offer or is coupled with any condition that varies or adds to the offer, it is not an acceptance, but is a counterproposition. *Griggs v. Oak* 296

10. Where one, to whom an offer is made, makes a counterproposition of different terms and new conditions, such counterproposition amounts to a rejection of the offer. *Griggs v. Oak* 296

11. In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them. *Leach v. Treber* 419

12. Mutuality of obligation of both parties to a con-

tract is not essential to effectuate a binding agreement where there is a separate valid consideration as an inducement to the agreement. *Leach v. Treber* 419

13. A promise which the promisor should reasonably expect to induce action or forebearance of a definite and substantial character on the part of the promisee and which does induce such action or forebearance is binding if injustice can be avoided only by enforcement of the promise. *Leach v. Treber* 419

14. Preliminary negotiations leading to the execution of an integrated agreement of uncertain meaning are admissible for the purpose of determining the intentions of the parties, the conditions existing at the time, and the objects thereby to be accomplished, but not to vary plain terms of the instrument. *Stillinger & Napier v. Central States Grain Co., Inc.* 458

15. If a construction contract is substantially performed, the damage caused by defective workmanship or unsuitable material used is measured by the fair and reasonable cost of remedying the defects. *Stillinger & Napier v. Central States Grain Co., Inc.* 458

16. A person in whose name a contract is made for the benefit of another may bring an action thereon without joining with him the person for whose benefit it is prosecuted. *McNish v. General Credit Corp.* 526

Corporations.

1. An officer or director of a corporation occupies a fiduciary relation to the corporation and is treated by a court of equity as a trustee. *Stillinger & Napier v. Central States Grain Co., Inc.* 458

2. An officer or director of a corporation, being a fiduciary, is denied business relationship with it without complete and truthful disclosure of all material facts known to him concerning the transaction and the subject matter of it. A material nondisclosure by a fiduciary constitutes fraud. *Stillinger & Napier v. Central States Grain Co., Inc.* 458

Counties.

1. Where a statute prohibits a county from making a

contract, and avoids the obligation of the contract for so doing, a recovery quantum meruit cannot be had. *Capital Bridge Co. v. County of Saunders* 304

2. Where a contract has been entered into in good faith with a county, which contract is within the power of the county to make but is void for the reason that statutory requirements were not complied with, an action in quantum meruit for the service performed or material furnished may be maintained. *Capital Bridge Co. v. County of Saunders* 304

3. The right to recover in quantum meruit for service performed or material furnished under a void contract with a county exists up to the limit of, and not beyond, that which would have been recoverable under a valid contract covering the same subject matter. *Capital Bridge Co. v. County of Saunders* 304

4. By statute, the obligation of a county upon a contract is void where the contract is contrary to a statutory limitation, or where there are no funds legally available at the time with which to pay the obligation, or in the absence of a statute expressly authorizing such contract. The statute has no application where the county has general authority to make the contract but the power has been irregularly exercised. *Capital Bridge Co. v. County of Saunders* 304

Courts.

1. Courts will not permit laymen to appear in court in a representative capacity and such a rule may not be circumvented by subterfuge. *Niklaus v. Abel Construction Co.* 842

2. While a layman may represent himself in court, he cannot, even on a single occasion, represent another, whether for a consideration or not. *Niklaus v. Abel Construction Co.* 842

Covenants.

1. A restrictive covenant that lots in an addition to a city shall be exclusively a residential area is unambiguous and prohibits use of the lots for any purpose other than residential. *Reed v. Williamson* 99

2. The mutual agreement and obligation of the signers of an instrument to conform to a restrictive covenant expressed therein are a sufficient consideration to support the contract. *Reed v. Williamson* 99

3. Restrictive covenants, particularly if negative, create equitable easements or servitudes which may be enforced in equity by anyone interested in the property without regard to privity either of contract or of estate and without regard to whether or not the covenants run with the land. *Reed v. Williamson* 99
4. A restrictive covenant is not required to be a grant or reservation. It creates an equitable right in the nature of an equitable easement or servitude enforceable in equity on no broader principle than that equity will enforce a proper contract concerning real estate against all taking with notice of it. *Reed v. Williamson* 99
5. The test of whether a change of condition of the surrounding neighborhood is a defense to an action to enforce a restrictive covenant is whether the original purpose and intention of the parties creating the restriction, pursuant to the general scheme, has been so destroyed by the changed condition that the restriction is no longer a substantial benefit to the residents. *Reed v. Williamson* 99
6. If the restriction in a residential area has been substantially complied with, the fact that adjoining or surrounding property is used for business purposes does not generally change the character of the area itself so that the owners of property therein may not be entitled to have the restriction enforced. *Reed v. Williamson* 99
7. Injunction is a proper remedy to prevent violation of a restrictive covenant. *Reed v. Williamson* 99

Criminal Law.

1. A confession of guilt alleged to have been made by the defendant is not admissible in evidence unless first shown to have been voluntarily made. *Parker v. State* 614
2. In laying the foundation for the determination of whether or not a confession was voluntarily made, the evidence to establish foundation must be taken out of the presence of the jury, if there is objection to taking it in the presence of the jury. *Parker v. State* 614
3. As a basis for the receipt of a confession in evidence the State is required to adduce evidence that the confession was voluntary. Witnesses of the State on this question may be cross-examined and the de-

fendant has the right to adduce countervailing evidence. *Parker v. State* 614
4. A confession is admissible if the affirmative evidence shows that it was voluntarily made and excludes any other hypothesis. *Parker v. State* 614
5. It is sufficient to establish the foundation for the admission of a confession in evidence that there is affirmative proof it was freely and voluntarily made and the hypothesis of improper inducements or threats is excluded. *Parker v. State* 614
6. The question of whether or not in the first instance the State has laid a proper and sufficient foundation for the admission of such evidence is one of law for the court. If the court determines as a matter of law that no sufficient foundation has been laid then the confession should be rejected. Where the confession is received in evidence, its voluntary character is still a question of fact for the jury. *Parker v. State* 614
7. Where separate confessions have been made and each are dependent on a separate foundation, admissibility depends upon the separate foundations. *Parker v. State* 614
8. It is ordinarily within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting. *Parker v. State* 614
9. In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce evidence in its possession for inspection by the defendant's counsel before trial. *Parker v. State* 614
10. It is only where there is in fact no preliminary examination upon a criminal charge, either in form or substance, that a plea in abatement may successfully be interposed. *Hoffman v. State* 679
11. In a criminal case, the credibility of witnesses and weight of evidence are for the jury to determine. The verdict of the jury may not be disturbed by the Supreme Court unless it is clearly wrong. *Pew v. State* 735
12. An accused, by making a plea of guilty, waives all defenses except that the complaint or information is not sufficient to charge an offense. *Stewart v. Ress* 876
13. A plea of guilty accepted by the court is a conviction or the equivalent of a conviction of the highest

order. The effect of it is to authorize the imposition of a sentence prescribed by law on a verdict of guilty of the crime charged. *Stewart v. Ress* 876

Crops.

1. The measure of damages to a growing crop that is destroyed by the wrongful act or omission of another is its value at the time of the destruction. *Patrick v. City of Bellevue* 196
2. Damage based upon the value of an unmatured crop is analagous to profits lost and is governed by the same rule precluding recovery in cases of either uncertainty or remoteness. *Patrick v. City of Bellevue* 196
3. The question of whether damage based on the destruction of an unmatured crop is speculative is decided by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if it had matured. *Patrick v. City of Bellevue* 196

Damages.

1. The measure of damages to a growing crop that is destroyed by the wrongful act or omission of another is its value at the time of the destruction. *Patrick v. City of Bellevue* 196
2. Damage based upon the value of an unmatured crop is analagous to profits lost and is governed by the same rule precluding recovery in cases of either uncertainty or remoteness. *Patrick v. City of Bellevue* 196
3. The question of whether damage based on the destruction of an unmatured crop is speculative is decided by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if it had matured. *Patrick v. City of Bellevue* 196
4. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or where it is clear that the jury disregarded the evidence or controlling rules of law. *Bezdek v. Patrick* 398
5. The question of the amount of damage is one solely for the jury. Its action will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved. *Bezdek v. Patrick* 398
6. If a construction contract is substantially performed,

the damage caused by defective workmanship or unsuitable material used is measured by the fair and reasonable cost of remedying the defects. *Stillinger & Napier v. Central States Grain Co., Inc.* 458

Declaratory Judgments.

The state is not a necessary party in an action by a taxpayer for a declaratory judgment attacking the validity of an assessment brought against the county treasurer and the county in which the property was assessed. *S. S. Kresge Co. v. Jensen* 833

Deeds.

A deed of real estate, absolute in form, may be shown by parol to have been intended by the parties to it as security for a debt or loan, and as between such parties, at least, the instrument will be construed to be a mortgage. *Koehn v. Koehn* 169

Divorce.

1. A decree of separate maintenance may be granted only when the evidence brings the case within the scope of the statute providing for such relief. *Robinson v. Robinson* 413
2. A decree of separate maintenance may not be granted on the uncorroborated declarations or admissions of the parties to the case. *Robinson v. Robinson* 413
3. In a divorce case where the custody of minor children is involved, the custody of the children is to be determined by the best interests of the children, with due regard for the superior rights of fit, proper, and suitable parents. *Speck v. Speck* 506
4. In awarding the custody of minor children the court looks to the best interests of the children. Children of tender age are usually awarded to the mother if she is a fit and proper person to have their custody. *Speck v. Speck* 506
5. Custody of minor children awarded to the mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree unless it is shown that the mother is an unfit person to have their custody, or that their best interests under all the circumstances require such action. *Speck v. Speck* 506
6. Child support payments under a divorce decree become vested in the payee as they accrue. The courts

are without authority to reduce the amounts of such accrued payments. *Speck v. Speck* 506
7. Extreme cruelty as ground for divorce defined. *Workman v. Workman* 642
8. A decree of divorce cannot be granted solely on the declarations, confessions, or admissions of the parties. There must be corroborative evidence. *Workman v. Workman* 642
9. It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances. *Workman v. Workman* 642
10. Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and a repetition of the offense revives the wrong condoned. *Workman v. Workman* 642
11. In a divorce suit where the court has jurisdiction of the parties, it has power to adjust all their respective property interests. *Workman v. Workman* 642
12. The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case. *Workman v. Workman* 642
13. Rule for determination of alimony in divorce case stated. *Workman v. Workman* 642
14. The Supreme Court will reverse on appeal a decree of divorce granted on uncorroborated testimony of a party. *O'Neill v. O'Neill* 674
15. Attorney's fees are not allowable in an action for divorce in the absence of statutory authority therefor. *O'Neill v. O'Neill* 674
16. The statutes of this state contain no provision for the allowance of attorney's fees in an action for divorce in favor of a husband and against a wife. *O'Neill v. O'Neill* 674
17. The courts are without authority in an action for divorce to fix the amount of the attorney's fees the parties are to pay their respective attorneys. *O'Neill v. O'Neill* 674

Drains.

1. A drainage district organized by vote of landowners has no duty to maintain and repair its works unless the plans and specifications of the project specifically provide therefor. *McGree v. Stanton-Pilger Drainage Dist.* 552

2. A drainage district organized by vote of landowners is liable for damages caused by the negligent construction of its works. *McGree v. Stanton-Pilger Drainage Dist.* 552

Easements.

1. Restrictive covenants, particularly if negative, create equitable easements or servitudes which may be enforced in equity by anyone interested in the property without regard to privity either of contract or of estate and without regard to whether or not the covenants run with the land. *Reed v. Williamson* 99
2. A restrictive covenant is not required to be a grant or reservation. It creates an equitable right in the nature of an equitable easement or servitude enforceable in equity on no broader principle than that equity will enforce a proper contract concerning real estate against all taking with notice of it. *Reed v. Williamson* 99

Elections.

1. A statute conferring a right to vote upon absentee and disabled voters will be strictly construed since its provisions are mandatory as to a voter desiring to exercise such right. *Haggard v. Misko* 778
2. Statutory provisions regulating the conduct of elections are directory only when they are not essential to a fair election and they are not made mandatory by the statute itself. *Haggard v. Misko* 778
3. Failure of a city clerk to keep a poll book of disabled voters in the form provided by law does not deprive an elector of the right to have his vote counted where he has complied with all mandatory provisions of the statute applicable to him. *Haggard v. Misko* 778
4. The posting of a notice of the convening of a canvassing board is directory. The failure to do so does not invalidate the votes of absentee and disabled voters. *Haggard v. Misko* 778
5. Irregularities of a canvassing board in conducting a canvass of votes cast at an election will not invalidate the votes of electors otherwise valid where there is no fraud and proper effect can be given to them. *Haggard v. Misko* 778
6. The statute that deals with election contests does not include a school district election held for the purpose

of contracting for the instruction of pupils. *Farrell v. School Dist. No. 54* 853

Embezzlement.

1. Under embezzlement statute, the failure of an agent to deliver property entrusted to his care to the proper person upon demand is prima facie proof of an intent to embezzle. *Hoffman v. State* 679
2. Embezzlement is the fraudulent appropriation or conversion of another's money or property by a person to whom it has been entrusted or into whose hands it has lawfully come by virtue of his employment with the felonious intent to defraud or deprive the owner thereof. *Hoffman v. State* 679
3. Conversion of the property alleged to have been embezzled to the personal use of the person charged is not an essential element of the crime of embezzlement. *Hoffman v. State* 679
4. The falsification of books and records and misrepresentations of fact for the purpose of concealing shortages of money or property entrusted to the defendant's care is competent evidence that such actions were done with a felonious intent. *Hoffman v. State* 679
5. In a prosecution for the embezzlement of gasoline, the amount to be allowed for normal shrinkage is a jury question. *Hoffman v. State* 679
6. Where evidence is adduced in a prosecution for embezzlement that a gasoline tank used by the defendant was found to be leaking on a date subsequent to the period in which the embezzlement is charged, it is admissible as a circumstance to be considered by the jury in determining if there was a reasonable doubt as to the guilt of the defendant. *Hoffman v. State* 679
7. In a prosecution for embezzlement, evidence of shortages of other products which suffered no loss by leakage is admissible as bearing upon the question of whether or not the shortage of gasoline resulted from a felonious act of the defendant or otherwise. *Hoffman v. State* 679
8. An error by the jury in calculating the amount embezzled is not material where it does not have the effect of changing the punishment of the defendant to his prejudice. *Hoffman v. State* 679

Eminent Domain.

1. In a condemnation proceeding, an error in a metes and bounds description may be corrected by the district court to conform to the plans and specifications, which were followed by actual survey and marking of the right-of-way on the ground. *McGree v. Stanton-Pilger Drainage Dist.* 552
2. On appeal from an award in a condemnation proceeding for a right-of-way, the judgment of the district court is conclusive upon the parties thereto as to all matters actually litigated, and also as to all matters necessarily within the issues whether formally presented or not. *McGree v. Stanton-Pilger Drainage Dist.* 552
3. In the trial of a condemnation proceeding the owner of property taken or damaged is entitled to have all proper elements of damage considered by the jury, and he cannot afterwards maintain an action to recover for damages omitted which were necessarily involved in the condemnation proceeding. *McGree v. Stanton-Pilger Drainage Dist.* 552
4. When land is taken outside the boundaries of the right-of-way condemned, it constitutes a second taking of private property for a public use and liability attaches therefor under Article I, section 21, of the Constitution. *McGree v. Stanton-Pilger Drainage Dist.* 552
5. In an action for damages based upon Article I, section 21, of the Constitution, against a drainage district organized by vote of landowners for the taking or damaging of private property for a public use, it is not necessary for plaintiff to plead or prove that he filed a notice. *McGree v. Stanton-Pilger Drainage Dist.* 552

Equity.

1. An equity court obtaining jurisdiction of a cause for any purpose will retain it for all purposes and proceed to final determination of all matters in issue thus avoiding unnecessary litigation. *Fiala v. Tomek* 20
2. The question of whether laches exists in a particular case depends upon its own peculiar circumstances and is addressed to the sound discretion of the court. *Caruso v. Moy* 68
3. A court of equity will consider the substance and

not the form. The particular form or words of a conveyance are unimportant if the intention of the parties can be ascertained. *Koehn v. Koehn* 169

Estoppel.

1. General rule as to elements of estoppel stated. *James v. McNair* 1
2. Equitable estoppel defined. *Roll v. Martin* 133
3. Where one by his own words or conduct willfully causes another to believe in a certain state of facts and thereby induces him to act on that belief so as to alter his own position, the former is concluded from averring against the latter a different state of facts from that represented. *Roll v. Martin* 133
4. Ordinarily estoppels in pais are available in favor of privies, provided the privity is created after the event out of which the estoppel arises, and provided the elements of such estoppel are present. *Roll v. Martin* 133
5. Title to real estate may not be created by estoppel but a party may estop himself, after a transaction has been fully executed, from asserting that the title he, by his own acts, has created or aided in creating is not the true title. *Roll v. Martin* 133

Evidence.

1. A municipal court will take judicial notice of the ordinances of the city. On appeal to the district court from a conviction under a city ordinance the latter court will on a trial de novo take notice of whatever facts the municipal court was required to notice judicially. *State v. Hohensee* 476
2. The official charts and records, kept in the regular course of business under the rules of a hospital, are admissible in evidence when a proper foundation has been laid. *Anderson v. Evans* 599
3. As limited in the opinion, the notes and entries by a nurse relating to care, treatment, and observation of patients in a hospital do not come within the Business Records as Evidence Act. *Anderson v. Evans* 599
4. Color photographs showing the physical condition of a plaintiff where his condition is an issue are admissible in evidence. *Anderson v. Evans* 599
5. A confession of guilt alleged to have been made by the defendant is not admissible in evidence unless first shown to have been voluntarily made. *Parker v. State* 614

6. In laying the foundation for the determination of whether or not a confession was voluntarily made, the evidence to establish foundation must be taken out of the presence of the jury, if there is objection to taking it in the presence of the jury. *Parker v. State* 614

7. As a basis for the receipt of a confession in evidence the State is required to adduce evidence that the confession was voluntary. Witnesses of the State on this question may be cross-examined and the defendant has the right to adduce countervailing evidence. *Parker v. State* 614

8. A confession is admissible if the affirmative evidence shows that it was voluntarily made and excludes any other hypothesis. *Parker v. State* 614

9. It is sufficient to establish the foundation for the admission of a confession in evidence that there is affirmative proof it was freely and voluntarily made and the hypothesis of improper inducements or threats is excluded. *Parker v. State* 614

10. The question of whether or not in the first instance the State has laid a proper and sufficient foundation for the admission of such evidence is one of law for the court. If the court determines as a matter of law that no sufficient foundation has been laid then the confession should be rejected. Where the confession is received in evidence, its voluntary character is still a question of fact for the jury. *Parker v. State* 614

11. Where separate confessions have been made and each are dependent on a separate foundation, admissibility depends upon the separate foundations. *Parker v. State* 614

12. Ordinarily evidence of conduct, acts, and utterances of a deceased person unrelated to a homicidal act and unconnected therewith is irrelevant and inadmissible in evidence. *Parker v. State* 614

13. The admission of evidence of conduct, acts, and utterances of a deceased person unrelated to a homicidal act and unconnected therewith is ordinarily error, but if it appears that the rights of the defendant were not prejudiced thereby the error may not be regarded as ground for reversal. *Parker v. State* 614

14. It is ordinarily within the discretion of the court to

permit in rebuttal the introduction of evidence not strictly rebutting. *Parker v. State* 614

15. In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce evidence in its possession for inspection by the defendant's counsel before trial. *Parker v. State* 614

16. The polygraph, commonly known as a lie detector, used for determining the truthfulness of testimony has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory. *Parker v. State* 614

17. The falsification of books and records and misrepresentations of fact for the purpose of concealing shortages of money or property entrusted to the defendant's care is competent evidence that such actions were done with a felonious intent. *Hoffman v. State* 679

18. Where evidence is adduced in a prosecution for embezzlement that a gasoline tank used by the defendant was found to be leaking on a date subsequent to the period in which the embezzlement is charged, it is admissible as a circumstance to be considered by the jury in determining if there was a reasonable doubt as to the guilt of the defendant. *Hoffman v. State* 679

19. In a prosecution for embezzlement, evidence of shortages of other products which suffered no loss by leakage is admissible as bearing upon the question of whether or not the shortage of gasoline resulted from a felonious act of the defendant or otherwise. *Hoffman v. State* 679

20. Testimony as to tire marks on the highways is admissible in civil actions for injury or damage where a sufficient foundation therefor is laid. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

21. Where a plaintiff is permitted to give evidence on a specific issue, defendant's evidence to the contrary is admissible on the same issue. *Elliott v. Brandt* 790

Executors and Administrators.

When one claims the estate of a deceased person under an alleged oral contract, the evidence of such contract must be clear, satisfactory, and unequivocal. *Drew v. Hawley* 141

Fire Protection Districts.

1. Nonjurisdictional irregularities and defects in the formation of rural fire protection districts can be challenged only in direct proceedings to test the validity of their organization. If the defects are of such a character that the proceedings are in fact void then that fact may be shown in any action. *Kelle v. Crab Orchard Rural Fire Protection Dist.* 593
2. The formation of rural fire protection districts may be collaterally attacked when the defects complained of are jurisdictional and not merely irregularities. *Kelle v. Crab Orchard Rural Fire Protection Dist.* 593
3. Compliance with statutory requirements as to number of signers and their qualifications is essential to validity of petition for rural fire protection district. *Kelle v. Crab Orchard Rural Fire Protection Dist.* 593

Forfeitures.

Ordinarily courts of equity will refuse to aid in the enforcement of penalties and forfeitures and leave the parties to whatever remedies they may have at law. However, this is not an absolute or inflexible rule and should yield when good reason exists for doing so. *McNish v. General Credit Corp.* 526

Forgery.

1. To utter and publish a forged instrument is to offer to pass it to another with intent to prejudice, damage, or defraud, declaring or asserting directly or indirectly by words or actions that it is good. *Crawford v. State* 231
2. In a prosecution for uttering and publishing a forged instrument, knowing it to be forged, a conviction cannot be sustained without proof of the forgery. *Crawford v. State* 231
3. To sustain a conviction for forgery, it is not sufficient for the State to show that the signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his authority. *Crawford v. State* 231

Fraud.

1. Where a party suffered injuries clearly in excess of any that were contemplated by the parties when a settlement and release of liability were made, it is evidence that may properly be considered, along

with the other evidence and circumstances in the case, in determining the question of fraud and misrepresentation in the procurement of the settlement and release. *Bryant v. Greene* 15

2. Equity may decree cancellation or rescission of a contract for fraud or misrepresentation constituting an inducement to its execution, especially when the legal remedy is inadequate or the equitable relief by way of cancellation is more complete. *Caruso v. Moy* 68

3. The right to rescind a contract for fraud or breach of covenant is barred by failure of the one party, for an unreasonable time after knowledge of the facts giving rise to such right, to declare a rescission and disclaim the benefits of the contract. *Caruso v. Moy* 68

4. An officer or director of a corporation, being a fiduciary, is denied business relationship with it without complete and truthful disclosure of all material facts known to him concerning the transaction and the subject matter of it. A material nondisclosure by a fiduciary constitutes fraud. *Stillinger & Napier v. Central States Grain Co., Inc.* 458

Frauds, Statute of.

1. When one claims the estate of a deceased person under an alleged oral contract, the evidence of such contract must be clear, satisfactory, and unequivocal. *Drew v. Hawley* 141

2. An oral contract partly performed, which the statute of frauds requires to be in writing, will be enforced by a court of equity. *Griggs v. Oak* 296

3. To obtain specific performance of an oral contract within the statute of frauds, the burden is upon the plaintiff to prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract. *Griggs v. Oak* 296

Fraudulent Conveyances.

1. A conveyance is declared to be fraudulent when its object or effect is to defraud another, or the intent with which it is made is to avoid some duty or debt

due by or incumbent upon the party making the transfer. *Smith v. Ely* 636
2. The intent may be gathered from the acts of the parties, and a conveyance becomes fraudulent in law when it is shown that it was made for the purpose of placing the property beyond the reach of creditors, or that it would hinder or delay them in collecting their just demands. *Smith v. Ely* 636

Gifts.

1. In the case of a gift and voluntary conveyance from a parent to his child or children, no presumption of fraud or undue influence arises as between the parties thereto by the mere fact of the relation. *Reynolds v. Knott* 365
2. The affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence, and will not render it voidable unless this influence has been so used as to confuse the judgment and control the will of the donor. *Reynolds v. Knott* 365

Habeas Corpus.

The sufficiency of evidence adduced at a preliminary hearing to hold an accused to answer for a crime with which he is charged may be raised and tried in habeas corpus proceedings. *Hoffman v. State* 679

Highways.

1. The word "highway" means a public road of general use by the public in travel from place to place. *School District No. 228 v. State Board of Education* 148
2. The word "improved" qualifying "highway" means a highway made better for travel by human effort. This includes one or more of the elements of grading, elevating or lowering a roadbed, surfacing, drainage, and like betterments. *School District No. 228 v. State Board of Education* 148
3. The word "reasonably" qualifying "improved highway" means sufficiently improved to meet the normal demands put upon its use. *School District No. 228 v. State Board of Education* 148
4. A driver of a motor vehicle about to enter a highway protected by stop signs must stop, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that

it would be obviously dangerous for him to proceed across the intersection. *Bezdek v. Patrick* 398
5. The violation of traffic regulations is not negligence as a matter of law of any kind or degree, but it is a fact to be considered with the other evidence in the case in deciding an issue of negligence. *Bezdek v. Patrick* 398
6. Duty of driver of a motor vehicle approaching a through street or highway stated. *Bezdek v. Patrick* 398
7. A motorist entering an intersection from the right has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored motor vehicle to exercise ordinary care. *Bezdek v. Patrick* 398
8. A person traveling a favored street protected by a stop sign, of which he has knowledge, may properly assume that oncoming traffic will obey it. *Bezdek v. Patrick* 398
9. A user of the highways may assume that other users of the highways will use them in a lawful manner, and until he has warning, notice, or knowledge to the contrary, he is entitled to govern his actions in accordance with such assumption. *Bezdek v. Patrick* 398
10. Upon entering an intersection, a motorist should have his motor vehicle under such control that he can avoid a collision with another vehicle which is operated with due care. *Bezdek v. Patrick* 398
11. The right of a motorist on an arterial highway to assume that a motor vehicle on a nonfavored intersecting street will be brought to a stop before entering the intersection does not permit him to claim the right-of-way when too far from the intersection to be entitled thereto. *Bezdek v. Patrick* 398
12. The violation of a statute, the purpose of which is to protect the safety of people in the use of the public highways, is not negligence per se but is evidence of negligence. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

Homicide.

1. Ordinarily evidence of conduct, acts, and utterances of a deceased person unrelated to a homicidal act and unconnected therewith is irrelevant and inadmissible in evidence. *Parker v. State* 614
2. The admission of evidence of conduct, acts, and utterances of a deceased person unrelated to a homi-

cidal act and unconnected therewith is ordinarily error, but if it appears that the rights of the defendant were not prejudiced thereby the error may not be regarded as ground for reversal. *Parker v. State* 614

Husband and Wife.

A directed verdict is proper in an action by a husband to recover for pecuniary injury suffered by reason of the death of his wife, wherein the evidence discloses that the husband was guilty of more than slight negligence as a matter of law. *Ecker v. Union P. R. R. Co.* 744

Indemnity.

An indemnitee may proceed against his indemnitor by an action ex contractu on the contract of indemnity. *National Reefer Service, Inc. v. Felman* 783

Indictments and Informations.

Where a crime created by statute may be committed by any of several methods, the information may charge in a single count that it was committed by any or all of the enumerated methods if they are not inconsistent with or repugnant to each other. *Hoffman v. State* 679

Infants.

1. Liability or nonliability in an instance where an infant is ordered into a dangerous situation by his employer does not depend upon presumption but upon knowledge and prudent action in relation thereto by the employee. *Anderson v. Evans* 599
2. Whether or not a minor between 14 and 15 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law. *Bear v. Auguy* 756
3. The degree of care required of a minor is that which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. *Bear v. Auguy* 756

Injunctions.

1. Injunction is a proper remedy to prevent violation of a restrictive covenant. *Reed v. Williamson* 99

2. The general rule is that prospective action of a city in the exercise of legislative power in relation to a subject committed to its jurisdiction cannot be enjoined. Courts will not ordinarily intervene until some effort is made to enforce alleged unauthorized action taken by the city. *Hillerege v. City of Scottsbluff* 560
3. In an action instituted by a resident taxpayer, a court of equity will restrain public officers from illegally creating a debt or obligation which must be paid by taxation. *Farrell v. School Dist. No. 54* 853

Insane Persons.

1. Where a person is not actually insane, but is incapable, through age or weakness of mind, of conducting his affairs, a suit may be maintained on his behalf by his next friend. *Fiala v. Tomek* 20
2. In general, any proof that is material and relevant to the issue of sanity or competency may be admitted upon the trial thereof. *Fiala v. Tomek* 20
3. In the determination of the mental condition of a person, his conversation, acts, declarations, and conduct in general may be shown. *Fiala v. Tomek* 20
4. The physical condition of a person alleged to be incompetent may be considered only insofar as it affects his mental condition. *Fiala v. Tomek* 20

Interest.

A borrower coming under the statutes relating to installment loans is not regarded as being in pari delicto but rather as being in vinculus to the lender, to whom he therefore owes no duty in equity. *McNish v. General Credit Corp.* 526

Joint Adventures.

1. A joint adventure is in the nature of a partnership, but may exist where persons embark on an undertaking without entering into the prosecution of a business as partners strictly but engage in a common enterprise for their mutual benefit. *Anderson v. Evans* 599
2. Requisites of a joint adventure stated. *Anderson v. Evans* 599

Joint Tenancy.

If a deposit is made in a bank payable to two persons,

either expressly as joint tenants with right of survivorship or without those or similar qualifying words, upon the death of one of the co-owners of the deposit it becomes the sole property of and is payable to the surviving co-owner. *Slocum v. Bohuslov* 156
Nelson v. Rasmussen 274

Judgments.

1. A determination by the proper county court in a proceeding brought to determine heirship is, after it becomes final, binding and conclusive on all persons. *Nelson v. Rasmussen* 274
2. The function of a nunc pro tunc order is not to correct some affirmative action of the court which ought to have been taken, but its purpose is to correct the record which has been made, so that it will truly express the action taken but which through inadvertence or mistake was not truly recorded. *Akins v. Chamberlain* 428
3. When a judgment is attacked collaterally, or when a long time after the judgment is entered the correctness of an officer's return is assailed, great faith and credit must be given to the formal return of the officer. *State v. County of Kimball* 479
4. A final judgment is one that disposes of the case either by dismissing it before hearing is had upon the merits, or after trial by rendition of judgment for the plaintiff or defendant. A judgment or order is not final unless it determines the rights of the litigants and precludes further inquiry. *Lindquist v. Towle* 524
5. On appeal from an award in a condemnation proceeding for a right-of-way, the judgment of the district court is conclusive upon the parties thereto as to all matters actually litigated, and also as to all matters necessarily within the issues whether formally presented or not. *McGree v. Stanton-Pilger Drainage Dist.* 552
6. In the trial of a condemnation proceeding the owner of property taken or damaged is entitled to have all proper elements of damage considered by the jury, and he cannot afterwards maintain an action to recover for damages omitted which were necessarily involved in the condemnation proceeding. *McGree v. Stanton-Pilger Drainage Dist.* 552
7. One aggrieved by the action of a county board of

equalization may appeal to the district court. One who fails to pursue this remedy is precluded from objecting to the valuation of his separate property for taxation purposes and a collateral attack may not be made thereon except where the assessment is void, willfully discriminatory, or the result of fraud. *S. S. Kresge Co. v. Jensen* 833

8. Collateral attack by taxpayer on valuation of his property is precluded by failure to exercise his right to a hearing before county board of equalization. *S. S. Kresge Co. v. Jensen* 833

Landlord and Tenant.

1. The occupancy of premises by one person with the consent or permission of the owner creates between the parties the relation of landlord and tenant. In the absence of an agreement or circumstances indicating a contrary intent, the law will imply an agreement on the part of the tenant to pay the reasonable value for his use and occupation. *Beacom v. Daley* 120
2. Where rent is payable yearly, and there is no provision for payment in advance, it is not due until the end of the year. *Beacom v. Daley* 120
3. In the absence of an express covenant or stipulation, a lessor is not bound to make repairs to leased property. *Sipprell v. Merner Motors* 447
4. Guests and invitees of a tenant have the same but no greater right to proceed against the landlord for personal injuries resulting from alleged defects on leased premises than the tenant has. *Sipprell v. Merner Motors* 447
5. Exceptions to the general rule of liability of a landlord to invitees of a tenant generally have no relation to conditions arising after leasing and surrender of control but only to those existing at the time of leasing. *Sipprell v. Merner Motors* 447
6. Subject to specific exceptions, the lessor of land is not liable for bodily harm caused to his lessee, or others upon the demised land with the consent of the lessee or sublessee, by any dangerous condition, whether natural or artificial, which existed when the lessee took possession. *Sipprell v. Merner Motors* 447

Larceny.

Generally, a thief can acquire no title to stolen property,

nor can title to personal property be acquired through another's larceny or theft. *Allstate Ins. Co. v. Enzolera* 38

Life Estates.

1. On the termination of a life estate, the reversioner is entitled to all rentals thereafter becoming due upon real estate. *Beacom v. Daley* 120
2. As between the life tenant and the owner of the fee, it is the duty of the former to pay all taxes charged against the land during the continuance of his estate. *Beacom v. Daley* 120
3. A life tenant must make all the ordinary repairs necessary to preserve the property and prevent its going to waste, but he need not make extraordinary repairs. *Beacom v. Daley* 120
4. The owner of a life estate is entitled to all the income from the property. *Slocum v. Bohuslov* 156
5. If the life tenant acquires other property by investment of the income, such property is subject only to his disposition of it. *Slocum v. Bohuslov* 156

Limitations of Actions.

1. An action for the recovery of the reasonable value for the use and occupancy of lands is not barred by the statute of limitations until 4 years have elapsed from the accruing of such action. *Beacom v. Daley* 120
2. Any voluntary payment made by the debtor upon such cause of action would arrest the running of the statute of limitations with reference thereto. *Beacom v. Daley* 120
3. To toll the statute of limitations, a voluntary payment must be intentionally and consciously made and accepted as part payment of the particular indebtedness. *Beacom v. Daley* 120
4. A certificate of deposit made payable on the return of the certificate properly endorsed with no other stipulation fixing a specified or determinable future time after date for payment thereof is a demand certificate and the statute of limitations does not begin to run thereon until demand for payment is made. *Powell v. Farmers State Bank* 180
5. A certificate of deposit made payable on the return of the certificate properly endorsed at a specified or determinable future time after date is a time certificate and the statute of limitations begins to run thereon at the expiration of such time without

the necessity of any demand for payment. *Powell v. Farmers State Bank* 180

Malicious Prosecution.

In the absence of malice, an action for the wrongful suing out of an attachment can be maintained alone on the attachment bond. To maintain an action independently of the statute, and not on the bond, malice in suing out the writ and want of probable cause must be averred. *Carlson v. Schroeder* 443

Mandamus.

The issuance of a peremptory writ of mandamus without notice is justified only where there is no room for controversy as to the right, and where from the facts set forth in the affidavit on which an application is based the court can take judicial notice that a valid excuse is impossible. *State ex rel. Beck v. Chicago, St. P., M. & O. Ry. Co.* 60

Master and Servant.

1. The relation of master and servant does not generally render the master liable for the torts of his servant, unless connected with his duties as such servant or within the scope of his employment. *Farr v. Cambridge Co-Operative Oil Co.* 45
2. If a servant does an act merely to frighten a third person or to perpetrate a joke on a third person, and the act is entirely disconnected from the purpose of the employment, the master generally is not liable therefor. *Farr v. Cambridge Co-Operative Oil Co.* 45
3. Duty of master to control his servant while the servant is acting outside the course of his employment stated. *Farr v. Cambridge Co-Operative Oil Co.* 45
4. A servant cannot recover from a master where he has subjected himself to manifest and inevitable danger which danger cannot be avoided by the exercise of ordinary care and skill, even if commanded by the master to incur the risk. *Anderson v. Evans* 599
5. If a master orders a servant into a place of danger and the servant is injured, the servant is not guilty of contributory negligence unless the danger is so glaring that a reasonably prudent person would not have entered into it. *Anderson v. Evans* 599
6. An employee who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are

open and obvious is chargeable with negligence or contributory negligence. *Anderson v. Evans* 599
7. An employee assumes risks not ordinarily incident to his employment, provided he knows of them and appreciates the danger, or provided they are so plainly observable that he must be presumed to know of them and to appreciate the danger. *Anderson v. Evans* 599
8. Where there is a disputed question of fact as to whether or not an employee was informed or had knowledge of latent dangers of his employment, a question is presented for determination by a jury. *Anderson v. Evans* 599
9. Liability or nonliability in an instance where an infant is ordered into a dangerous situation by his employer does not depend upon presumption but upon knowledge and prudent action in relation thereto by the employee. *Anderson v. Evans* 599

Mines and Minerals.

A valid restriction that lots in an addition to a city shall be exclusively a residential area prevents use of them for the exploration for or production of oil and gas. *Reed v. Williamson* 99

Mortgages.

1. A deed of real estate, absolute in form, may be shown by parol to have been intended by the parties to it as security for a debt or loan, and as between such parties, at least, the instrument will be construed to be a mortgage. *Koehn v. Koehn* 169
2. If the evidence shows that an instrument is intended by the parties to be security for a debt it is in equity, without regard to its form or name, a mortgage. *Koehn v. Koehn* 169

Motor Carriers.

1. By statute, a common carrier is defined as any person who or which undertakes to transport passengers or property for the general public in intrastate commerce by motor vehicle for hire, whether over regular or irregular routes, upon the highways of this state. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85
2. The declared policy of the Motor Carrier Act is to regulate transportation in the public interest, and to promote efficient service without undue prefer-

ences or advantages, and unfair or destructive competitive practices. The declared policy does not condemn competition. It does condemn unfair or destructive competitive practices. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85

Municipal Corporations.

1. A restrictive covenant that lots in an addition to a city shall be exclusively a residential area is unambiguous and prohibits use of the lots for any purpose other than residential. *Reed v. Williamson* 99
2. The test of whether a change of condition of the surrounding neighborhood is a defense to an action to enforce a restrictive covenant is whether the original purpose and intention of the parties creating the restriction, pursuant to the general scheme, has been so destroyed by the changed condition that the restriction is no longer a substantial benefit to the residents. *Reed v. Williamson* 99
3. If the restriction in a residential area has been substantially complied with, the fact that adjoining or surrounding property is used for business purposes does not generally change the character of the area itself so that the owners of property therein may not be entitled to have the restriction enforced. *Reed v. Williamson* 99
4. In establishing and maintaining a free dump for the disposal of garbage, a city performs a governmental function. *Patrick v. City of Bellevue* 196
5. Temporary damage to land caused by the establishment and maintenance of a free dump for the disposal of garbage is such a damage as is required to be compensated by Article I, section 21, of the Constitution. *Patrick v. City of Bellevue* 196
6. Even though city was performing a governmental function and did not create a nuisance, the Constitution requires payment of just compensation for damage to private property for public use by a city. *Patrick v. City of Bellevue* 196
7. The fact that the city is not liable for the negligence of its officers, agents, or employees when the city is engaged in the performance of a governmental function does not exempt it from liability for damage to private property in the exercise of its powers of eminent domain. *Patrick v. City of Bellevue* 196
8. Private property damaged by a city for a public purpose without an actual taking thereof is required

by the Constitution to be justly compensated. *Patrick v. City of Bellevue* 196

9. Municipal revenue bonds are obligations of a city even though they are not general obligations and not subject to payment through the exercise of the taxing power. *State ex rel. Beck v. City of York* 223

10. Money derived from the sale of municipal revenue bonds is public money. *State ex rel. Beck v. City of York* 223

11. The purchase of land by a municipality and the erection of an industrial plant thereon for lease to a private corporation for private gain and profit, by issuing revenue bonds to be paid solely from rentals, is not for a public purpose. *State ex rel. Beck v. City of York* 223

12. Statute authorizing the building and leasing of industrial plants to private concerns for use for private profit or gain, financed by municipal revenue bonds payable solely from rentals, violates Article XIII, section 3, of the Constitution. *State ex rel. Beck v. City of York* 223

13. The Constitution gives the Legislature exclusive power and authority to divide the state into legislative districts. Annexation ordinances enacted by municipalities do not change the territorial boundaries of legislative districts. *Buller v. City of Omaha* 435

14. A lot owner in a municipality is not required to repair an adjacent sidewalk until he has been notified by the municipality to do so, and in the absence of such notice he is not liable to pedestrians for damages for personal injuries. *Sipprell v. Merner Motors* 447

15. A lot owner may be held in damages where defects in a sidewalk have been caused by his affirmative wrong doing or wrongful use of a sidewalk. *Sipprell v. Merner Motors* 447

16. A municipal court will take judicial notice of the ordinances of the city. On appeal to the district court from a conviction under a city ordinance the latter court will on a trial de novo take notice of whatever facts the municipal court was required to notice judicially. *State v. Hohensee* 476

17. On an appeal to the Supreme Court from a judgment of the district court convicting a defendant of a violation of a city ordinance, the existence of a valid ordinance creating the offense charged will

be presumed where the ordinance is not properly set forth in the record. *State v. Hohensee* 476

18. On appeal to the Supreme Court from a judgment of the district court convicting a defendant of the violation of a municipal ordinance, it will be presumed, nothing appearing to the contrary, that the facts set out in the complaint constituted a violation of the ordinance of the city. *State v. Hohensee* 476

19. A prosecution for the violation of a city ordinance, which does not embrace any offense made criminal by the laws of the state, while in form a criminal proceeding, is, in fact, a civil one to recover a penalty, and a preponderance of the evidence is all that is required to sustain a conviction. *State v. Hohensee* 476

20. The title to a street is not generally a fee simple absolute but is a qualified base or determinable fee. It is held in trust for the purposes to which the street is dedicated. *Hillerege v. City of Scottsbluff* 560

21. The right which an owner of abutting property possesses in a street is different in kind from that possessed by one whose interest is only that of a right-of-way along the street. *Hillerege v. City of Scottsbluff* 560

22. The right of an owner of property abutting on a street to ingress and egress to and from his premises by way of such street is a property right in the nature of an easement of which he cannot be deprived without due process of law and compensation for his loss. *Hillerege v. City of Scottsbluff* 560

23. The owner of property abutting on a street is not entitled, as against the public, to access to his land at all points in the boundary between it and a street, although entire access cannot be denied him. The measure of the right of the property owner is reasonable ingress and egress under all the circumstances. *Hillerege v. City of Scottsbluff* 560

24. The grant by the state to a city of the power to control and improve streets in any manner it deems proper is the delegation of police power to be exercised with a sound discretion in a reasonable and not in an arbitrary or discriminatory manner. *Hillerege v. City of Scottsbluff* 560

25. It is the right of a city, in the exercise of the police power delegated to it in reference to its streets, to

determine the action required for the safety, convenience, and welfare of the public. *Hillerege v. City of Scottsbluff* 560

26. The action of a city in the exercise of the police power is not absolute or final but is subject to judicial review. *Hillerege v. City of Scottsbluff* 560

27. The test of the proper exercise of police power is whether or not the action proposed is a good faith, reasonable exercise of the power or is an arbitrary and unreasonable interference with the rights of persons affected thereby. *Hillerege v. City of Scottsbluff* 560

28. Action taken by a city in the exercise of the police power is presumed to be valid. The burden is on the party contesting its validity to establish by clear and unequivocal proof that it is so unreasonable, arbitrary, or discriminatory as to amount to depriving the party of his property without due process of law. *Hillerege v. City of Scottsbluff* 560

29. Municipal action, in the exercise of the police power, is not necessarily invalid because it infringes on private rights or property but such infringement may not be unreasonable, discriminatory, or confiscatory. *Hillerege v. City of Scottsbluff* 560

30. It is a denial of equal protection of the law to apply a regulation differently to different persons under the same or similar circumstances. *Hillerege v. City of Scottsbluff* 560

31. Municipal action applicable to all persons affected thereby within the area described is not discriminatory. *Hillerege v. City of Scottsbluff* 560

32. The general rule is that prospective action of a city in the exercise of legislative power in relation to a subject committed to its jurisdiction cannot be enjoined. Courts will not ordinarily intervene until some effort is made to enforce alleged unauthorized action taken by the city. *Hillerege v. City of Scottsbluff* 560

33. The violation of city ordinances or statutes regulating the use and operation of motor vehicles upon the highway is not negligence per se but evidence of negligence. Where the evidence is such that reasonable minds may draw different conclusions therefrom, the question of negligence is for the jury. *Bear v. Auguy* 756

34. Firemen's Pension Act contemplates a hearing before proper municipal authorities and a decision

based upon evidence presented at the hearing as a condition to the right therein provided. *Schaub v. City of Scottsbluff* 805

35. The requirement that it be ascertained by proper municipal authorities within 12 months of the date of the accident that the disability of the fireman has become permanent is mandatory and a condition of the right of recovery of benefits after the expiration of the designated period. *Schaub v. City of Scottsbluff* 805

36. Although taxpayers have an interest which entitles them to protect the interest of a municipal corporation, the cause of action remains in the corporation and final relief is for its benefit. *Niklaus v. Abel Construction Co.* 842

37. Statute authorizing taxpayer's suit clearly recognizes that the cause of action is that of the city and not that of the citizen or taxpayer. *Niklaus v. Abel Construction Co.* 842

38. Where the officers of a public corporation refuse to act, the taxpayer may bring suit on behalf of himself and others similarly situated. The direct injury to be remedied where the taxpayer sets the judicial machinery in motion for that purpose is not personal and direct to himself, but to the corporation. *Niklaus v. Abel Construction Co.* 842

Names.

1. In law the name of a person consists of one given name and one surname and the two, using the given name first and the surname last, constitute such person's legal name. *Kelle v. Crab Orchard Rural Fire Protection Dist.* 593

2. A married woman's name consists, in law, of her own Christian name and her husband's surname. Marriage confers on her the surname of the husband. *Kelle v. Crab Orchard Rural Fire Protection Dist.* 593

Negligence.

1. Gross negligence within the meaning of the guest statute is great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty. *Holliday v. Patchen* 53

2. To recover damages from a host for injuries received while riding in an automobile operated by the

host, a guest must prove by a preponderance of the evidence the gross negligence relied upon and that it was the proximate cause of the accident. *Holliday v. Patchen* 53

3. When the evidence is resolved most favorably toward the existence of gross negligence and the facts thus determined, the question of whether or not they support a finding of gross negligence is one of law. *Holliday v. Patchen* 53

4. The operation of an automobile at a rate of speed prohibited by law is not in itself gross negligence. *Holliday v. Patchen* 53

5. Momentary inattention in the operation of a motor vehicle does not ordinarily amount to gross negligence. This is true even where such inattention is voluntary and in no manner induced by a distracting influence. *Holliday v. Patchen* 53

6. A warning of imminent danger to a host by a guest riding in an automobile operated by such host must be made in time to afford the host a reasonable opportunity to avoid the accident. *Holliday v. Patchen* 53

7. Where the negligence of the driver of an automobile is the sole proximate cause of a collision in which a guest is injured, the guest cannot recover from a third person for such injury. *Burhoop v. Bracken* 382

8. A lot owner in a municipality is not required to repair an adjacent sidewalk until he has been notified by the municipality to do so, and in the absence of such notice he is not liable to pedestrians for damages for personal injuries. *Sipprell v. Merner Motors* 447

9. A lot owner may be held in damages where defects in a sidewalk have been caused by his affirmative wrong doing or wrongful use of a sidewalk. *Sipprell v. Merner Motors* 447

10. In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it. *Sipprell v. Merner Motors* 447

11. The proprietor of a salesroom is not an insurer against accidents to customers, but is bound to exercise reasonable care and prudence to keep the premises, which the public is tacitly invited to use, safe for that purpose. *Sipprell v. Merner Motors* 447

12. The fact that an invitee falls upon steps leading from the exit of a building to the sidewalk below does not raise any presumption of negligence on the part of its owner, and the doctrine of res ipsa loquitur does not apply. *Sipprell v. Merner Motors* 447
13. A servant cannot recover from a master where he has subjected himself to manifest and inevitable danger which danger cannot be avoided by the exercise of ordinary care and skill, even if commanded by the master to incur the risk. *Anderson v. Evans* 599
14. If a master orders a servant into a place of danger and the servant is injured, the servant is not guilty of contributory negligence unless the danger is so glaring that a reasonably prudent person would not have entered into it. *Anderson v. Evans* 599
15. An employee who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is chargeable with negligence or contributory negligence. *Anderson v. Evans* 599
16. An employee assumes risks not ordinarily incident to his employment, provided he knows of them and appreciates the danger, or provided they are so plainly observable that he must be presumed to know of them and to appreciate the danger. *Anderson v. Evans* 599
17. Where there is a disputed question of fact as to whether or not an employee was informed or had knowledge of latent dangers of his employment, a question is presented for determination by a jury. *Anderson v. Evans* 599
18. An allegation that an accident and resulting damage was solely and proximately caused by the negligence of a third person is not an affirmative defense and imposes no burden of proof. *Buhrman v. Smollen* 655
19. A litigant who charges his adversary with negligence has the burden throughout the litigation to establish it. *Federal Ins. Co. v. International Harvester Co.* 698
20. In a negligence action, plaintiff has the burden of establishing that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704
21. Proof of negligence is sufficient if the facts and circumstances proved, together with the reasonable

inferences which may be drawn therefrom, shall indicate with reasonable certainty the negligent act of which complaint is made. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

22. Where the accident and resulting damages were solely and proximately caused by the negligence of a third person, such issue is provable under a general denial. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

23. The violation of a statute, the purpose of which is to protect the safety of people in the use of the public highways, is not negligence per se but is evidence of negligence. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

24. Rule of intervening efficient cause in negligence case stated. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

25. If the original negligence is of a character which is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it and the subsequent mischief will be held to be the result of the original negligence. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

26. In a negligence case, where different minds may reasonably draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, the issues must be submitted to the jury for its determination, and its verdict based thereon will not be disturbed unless clearly wrong. *Egenberger v. National Alfalfa Dehyrating & Milling Co.* 704

27. Where the use of intoxicating liquor is so close in time to an accident as to be considered an incident relating thereto, it may be admitted as a circumstance proper to be considered by a jury in determining the existence or nonexistence of negligence. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

28. It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and evidence, and such rule applies in negligence cases. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

29. Where the evidence adduced to sustain issues of negligence and proximate cause are such that rea-

sonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the issues as a matter of law rather than submit them to a jury for determination. *Ecker v. Union P. R. R. Co.* 744

30. Contributory negligence defined. *Ecker v. Union P. R. R. Co.* 744

31. Proximate cause is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which it would not have occurred. *Ecker v. Union P. R. R. Co.* 744
Bear v. Auguy 756

32. Ordinarily, where the negligence of one party is merely passive and potential causing only a condition while that of the other is the moving and effective cause of the accident, the latter is the proximate cause. *Ecker v. Union P. R. R. Co.* 744

33. A directed verdict is proper in an action by a husband to recover for pecuniary injury suffered by reason of the death of his wife, wherein the evidence discloses that the husband was guilty of more than slight negligence as a matter of law. *Ecker v. Union P. R. R. Co.* 744

34. When in an action for wrongful death the evidence discloses that plaintiff's decedent was guilty of negligence more than slight as a matter of law which proximately contributed to or caused the accident and death, it is the duty of the court to direct a verdict for defendant. *Ecker v. Union P. R. R. Co.* 744

35. A person who knowingly and of his own volition exposes himself to obvious danger cannot recover damages for any injury which he might have avoided by the use of reasonable care. *Ecker v. Union P. R. R. Co.* 744

36. A traveler on a highway is required to exercise reasonable care for the safety of others thereon. *Bear v. Auguy* 756

37. What is reasonable care does not permit of definitive statement applicable to all cases but the presence or absence of reasonable care must be determined by the facts and circumstances of each case. *Bear v. Auguy* 756

38. The lawfulness of the speed of a motor vehicle within the prima facie limits fixed by statute is determined by the further test of whether the speed was greater than was reasonable and pru-

dent under the conditions then existing. *Bear v. Auguy* 756

39. A driver is required to have his motor vehicle under such reasonable control as will enable him to avoid a collision with other vehicles, assuming that the drivers thereof will exercise due care. *Bear v. Auguy* 756

40. Duty of motorist with respect to keeping a proper lookout stated. *Bear v. Auguy* 756

41. The violation of city ordinances or statutes regulating the use and operation of motor vehicles upon the highway is not negligence per se but evidence of negligence. Where the evidence is such that reasonable minds may draw different conclusions therefrom, the question of negligence is for the jury. *Bear v. Auguy* 756

42. Where different minds may reasonably draw different conclusions from the evidence, or if there is a conflict in the evidence, as to whether or not the evidence establishes negligence or contributory negligence and the degree thereof, when one is compared with the other, such issues must be submitted to a jury. *Bear v. Auguy* 756

43. Whether or not a minor between 14 and 15 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law. *Bear v. Auguy* 756

44. The degree of care required of a minor is that which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. *Bear v. Auguy* 756

New Trial.

A new trial will be granted on the ground of newly discovered evidence only if the evidence is material and could not with reasonable diligence have been discovered at the time of the trial, which evidence would probably change the result substantially and favorably to the applicant. *Romans v. Bowen* 209

Parent and Child.

1. In the case of a gift and voluntary conveyance from a parent to his child or children, no presumption of fraud or undue influence arises as between the parties thereto by the mere fact of the relation. *Reynolds v. Knott* 365

2. The affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence, and will not render it voidable unless this influence has been so used as to confuse the judgment and control the will of the donor. *Reynolds v. Knott* 365

Parties.

1. In a proceeding in error to reverse the action of the county superintendent in creating a new district or changing the boundaries of an existing district affecting a city, village, or Class III school district, the board of education is the real party in interest. *Clausen v. School Dist. No. 33* 78
2. In a proceeding in error to reverse the action of the county superintendent in creating a new district or changing the boundaries of existing districts in case of changes affecting districts other than city, village, or Class III school districts, the petitioners who signed the petitions for change of boundaries or new district creation are the real parties in interest. *Clausen v. School Dist. No 33* 78
3. In a proceeding in error the summons must be served upon the real party or parties in interest or the attorney of record of the defendant or defendants in error, unless the issuance or service is waived in writing by the attorney or the defendants. *Clausen v. School Dist. No. 33* 78
4. In a proceeding in error all necessary parties must be made parties to the proceeding. *Clausen v. School Dist. No. 33* 78
5. All parties to a joint judgment are necessary parties to a proceeding in error brought to reverse such judgment. *Clausen v. School Dist. No. 33* 78
6. The failure to make all parties who may be affected by the modification or reversal of a judgment in a proceeding to review the cause by petition in error is ground for dismissal of the petition. *Clausen v. School Dist. No. 33*..... 78
7. One necessary party who has been properly served with summons in a proceeding in error may properly move for dismissal of the petition for failure to make others parties to the proceedings. *Clausen v. School Dist. No. 33* 78
8. The real party in interest is the person entitled to the avails of the suit. *McNish v. General Credit Corp.* 526

9. A person in whose name a contract is made for the benefit of another may bring an action thereon without joining with him the person for whose benefit it is prosecuted. *McNish v. General Credit Corp.* 526
10. The state is not a necessary party in an action by a taxpayer for a declaratory judgment attacking the validity of an assessment brought against the county treasurer and the county in which the property was assessed. *S. S. Kresge Co. v. Jensen* 833

Partnership.

A partnership is created by contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions. *Anderson v. Evans* 599

Penalties.

1. A prosecution for the violation of a city ordinance, which does not embrace any offense made criminal by the laws of the state, while in form a criminal proceeding, is, in fact, a civil one to recover a penalty, and a preponderance of the evidence is all that is required to sustain a conviction. *State v. Hohensee* 476
2. Ordinarily courts of equity will refuse to aid in the enforcement of penalties and forfeitures and leave the parties to whatever remedies they may have at law. However, this is not an absolute or inflexible rule and should yield when good reason exists for doing so. *McNish v. General Credit Corp.* 526

Pensions.

1. The right to a fireman's pension is statutory. The Legislature has authority to attach any condition to the existence of the right it desires. *Schaub v. City of Scottsbluff* 805
2. Firemen's Pension Act contemplates a hearing before proper municipal authorities and a decision based upon evidence presented at the hearing as a condition to the right therein provided. *Schaub v. City of Scottsbluff* 805
3. The requirement that it be ascertained by proper municipal authorities within 12 months of the date of the accident that the disability of the fireman has become permanent is mandatory and a condition

of the right of recovery of benefits after the expiration of the designated period. *Schaub v. City of Scottsbluff* 805

4. The Legislature intended partial disability to describe and mean the identical condition with reference to temporary total disability in Firemen's Pension Act. *Schaub v. City of Scottsbluff* 805
5. A fireman is permanently and totally disabled under the Firemen's Pension Act when the disability from which he suffers renders him permanently unable to obtain, hold, or do any substantial amount of remunerative work, either in his previous occupation or in any other established and recognized field of employment for which he is fitted. *Schaub v. City of Scottsbluff* 805
6. Total disability contemplates the loss of earning power. In measuring such loss consideration should be given to the ability to earn wages, eligibility to procure employment generally, ability to hold a job obtained, and the capacity to perform the tasks of the work in which a person is engaged. *Schaub v. City of Scottsbluff* 805

Pleading.

1. It is not indispensable that a constitutional provision be set out or its existence alleged in the statement of a cause of action if the litigant otherwise pleads and proves a right of recovery because of it. *Patrick v. City of Bellevue* 196
2. When an answer to a petition consists of a general denial, the defendant may introduce such testimony as will tend to disprove the testimony of the plaintiff in support of his petition. For such purpose no other allegations in the answer are necessary. *Towner v. Western Contracting Corp.* 235
3. In an action on a promissory note, the party alleging want of consideration has the burden of proving it by a preponderance of the evidence. *Leach v. Treber* 419
4. A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact. *Buller v. City of Omaha* 435
5. In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof, if the allegations stated therein either

aid the petition in stating a cause of action or charge facts going to avoid liability on the part of the defendant. *Buller v. City of Omaha* 435

6. An admission made in a pleading on which the trial is had is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it. It is therefore a limitation of the issues. *McNish v. General Credit Corp.* 526

7. An allegation that an accident and resulting damage was solely and proximately caused by the negligence of a third person is not an affirmative defense and imposes no burden of proof. *Buhrman v. Smollen* 655

8. The failure of a petition to state a cause of action may be challenged at any time during the pendency of the litigation. *Federal Ins. Co. v. International Harvester Co.* 698

9. Where the accident and resulting damages were solely and proximately caused by the negligence of a third person, such issue is provable under a general denial. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

Principal and Agent.

1. A person gratuitously assuming as agent or trustee to control or manage the property or interests of another is as firmly bound by the implied terms of his confidential relation as one who is regularly employed and paid. *James v. McNair* 1

2. Where a principal has placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in presuming that such agent has authority to perform a particular act, the principal is estopped as against such third person from denying the agent's authority. *McNish v. General Credit Corp.* 526

3. Whether or not an act is within the scope of an agent's apparent authority is to be determined as a question of fact from all the circumstances of the transaction and the business. *McNish v. General Credit Corp.* 526

4. If the principal desires to repudiate the unauthorized act of his agent, he must, as soon as he acquires knowledge of the facts, return or tender a return of any benefits received as the result of such

acts, or be held to have ratified them. *McNish v. General Credit Corp.* 526
5. A principal who accepts the benefits of a contract executed in his behalf by an agent is chargeable with the instrumentalities employed by the latter in procuring it. *McNish v. General Credit Corp.* 526

Process.

1. Where the return of an officer recites that he served the summons on which the return is endorsed, the presumption is that he performed his duty in making the service. *State v. County of Kimball* 479
2. An officer's return on a summons is prima facie proof of the service therein indicated. *State v. County of Kimball* 479
3. The return of an officer cannot be impeached except by clear and convincing evidence. *State v. County of Kimball* 479

Public Service Commissions.

1. Rule relating to continuances before the railway commission applies generally to applications, made to the commission as such, for a continuance prior to the beginning of a hearing. It is not applicable to ordinary motions for continuances during a hearing before an examiner. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85
2. An order of the railway commission, making ultimate findings of fact in the language of the statutes, is not void because of the failure of the commission to make basic findings of fact in the order upon which the ultimate facts rest. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85
3. Courts are without authority to interfere with the findings and orders of the railway commission except where it exceeds its jurisdiction or acts arbitrarily. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85
4. The declared policy of the Motor Carrier Act is to regulate transportation in the public interest, and to promote efficient service without undue preferences or advantages, and unfair or destructive competitive practices. The declared policy does not condemn competition. It does condemn unfair or destructive competitive practices. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85
5. Function of Supreme Court in reviewing orders of

the railway commission stated. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85

6. Courts should review or interfere with administrative and legislative action of the railway commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265

7. On appeal to the Supreme Court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265
City of Bayard v. North Central Gas Co. 819

8. Upon appeal to the Supreme Court from a decision of the railway commission involving charges of a railway company or other common carrier, the rates fixed by the commission will be considered prima facie just and equitable. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265

9. A statute specifically authorizes the railway commission to put into effect certain rates when an emergency exists. The commission, in doing so, exercises its legislative authority to regulate rates, to declare an emergency, and to prescribe the time when such rates shall become effective. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265

10. Where the railway commission specifically adopts the rates and charges fixed by the Interstate Commerce Commission as its own, they become the regularly fixed rates and charges of the railway commission until altered or set aside. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265

11. Rates and charges duly established by the railway commission, until altered or set aside, have the effect of a legislative enactment. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247, 265

12. It is unjust discrimination or undue preference only, under substantially similar circumstances and conditions, that is unlawful and prohibited. *Chicago, B. & Q. R. R. Co. v. Herman Bros. Inc.* 247

13. Courts should review or interfere with administrative and legislative action of the railway commission only so far as is necessary to keep it within its

jurisdiction and protect legal and constitutional rights. *City of Bayard v. North Central Gas Co.* 819

14. Operation for hire is a jurisdictional prerequisite to general regulation of a common carrier by the railway commission. Common carrier is defined. *City of Bayard v. North Central Gas Co.* 819

Public Utilities.

Function of Supreme Court in reviewing orders of the railway commission stated. *Ferguson Trucking Co., Inc. v. Rogers Truck Line* 85

Rape.

1. The exertion of force by the accused or resistance by the female is not essential to the commission of assault with intent to commit rape if the latter is incapable of giving consent because of her age and the accused is at least 18 years of age. *Pew v. State* 735

2. In a prosecution for assault with intent to commit rape, if the prosecutrix testifies to facts constituting the offense and the accused denies the commission of the crime, the testimony of the prosecutrix must be corroborated on material points by other evidence to sustain a conviction of the accused. *Pew v. State* 735

3. It is not essential in a rape case that the prosecutrix be corroborated by other evidence as to the principal act constituting the offense but it is indispensable that she be corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue. *Pew v. State* 735

4. In a prosecution for an assault with intent to commit rape proof that the accused had opportunity and inclination to assault the prosecutrix with intent to ravish her may be sufficient corroboration of direct and positive evidence by her that he did so. *Pew v. State* 735

5. A finding of guilt of the offense of assault with intent to commit rape is justified where a male person, at least 18 years of age and capable of completing the offense, physically abuses or injures the person of a female, prohibited because of her age from giving consent, with the intention of then having sexual intercourse. *Pew v. State* 735

Release.

1. When the amount received for a release of liability is grossly inadequate to compensate for the injuries sustained, that fact may be considered, with the other evidence and circumstances in the case, as tending to show that the party executing the release was overreached and that the minds of the parties never met in the consummation of a valid agreement. *Bryant v. Greene* 15
2. Where a party suffered injuries clearly in excess of any that were contemplated by the parties when a settlement and release of liability were made, it is evidence that may properly be considered, along with the other evidence and circumstances in the case, in determining the question of fraud and misrepresentation in the procurement of the settlement and release. *Bryant v. Greene* 15

Schools and School Districts.

1. The education of physically handicapped children is provided for in an independent act dealing exclusively and fully with that subject. *Schutte v. Decker* 582
2. The general school laws have no applicability to the transportation of a physically handicapped child who is required to attend a special school outside of the school district in which he lives. *Schutte v. Decker* 582
3. The Constitution of this state vests all matters pertaining to schools and school districts, and their creation, dissolution, government, and control, in the Legislature. In all such matters the state is supreme. *Farrell v. School Dist. No. 54* 853
4. A statute provides for the procedure to be followed at the time an original transfer is made of pupils from the school district of their residence in one county to an adjoining school district of another county for educational purposes. *Farrell v. School Dist. No. 54* 853
5. Statute authorizing transfer does not provide for a renewal of a transfer of pupils from the school district of their residence in one county to an adjoining school district of another county, but authorizes the parents or guardians of such pupils to recall a request for an original transfer within 15 days after the county clerk has received the certificate of transfer. *Farrell v. School Dist. No. 54* 853

6. Statute authorizing transfer of pupils is effective for one year only. A transfer once granted ceases to exist unless a renewal is made. When a transfer is once renewed, it is in existence for a period of one year and may not in the interim be recalled, revoked, or canceled. *Farrell v. School Dist. No. 54* 853
7. The procedure for a recall of an orignial transfer of pupils does not apply to a recall of a renewal of a transfer. *Farrell v. School Dist. No. 54* 853
8. Statute authorizes one school district to contract for instruction of pupils in another district for a period not exceeding 3 years, when a majority of the votes cast at the annual or special meeting of a school district favor such a proposition. *Farrell v. School Dist No. 54* 853
9. School boards of Class II districts are creatures of statute with power to bind the district only within the limits fixed by the Legislature. *Farrell v. School Dist. No. 54* 853
10. A Class II school district is a creature of statute possessing no powers to contract beyond those granted by the Legislature. *Farrell v. School Dist. No. 54* 853
11. In case a Class II school district enters into a contract without the power granted by the Legislature such contract must be declared void and invalidated in an appropriate action. *Farrell v. School Dist. No. 54* 853
12. The Legislature intended that parents or guardians of children transferred to a school district in an adjoining county, while such transfers are in effect, are not entitled to vote and are not considered legal voters in their home school district. *Farrell v. School Dist. No. 54* 853

Specific Performance.

1. One seeking specific performance of an oral contract to will property has the burden not only of proving the contract but also that he has performed the obligations imposed upon him thereby. *Drew v. Hawley* 141
2. An interested third person who seeks to enforce an oral contract to will property has the burden not only of proving the contract but also that the obligations imposed by the contract have been performed. *Drew v. Hawley* 141
3. An oral contract partly performed, which the stat-

ute of frauds requires to be in writing, will be enforced by a court of equity. *Griggs v. Oak* 296

4. To obtain specific performance of an oral contract within the statute of frauds, the burden is upon the plaintiff to prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract. *Griggs v. Oak* 296

Statutes.

1. In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary, and popular sense, should be taken into account, in order to determine the legislative will. *School District No. 228 v. State Board of Education* 148
2. In construing a statute the legislative intent is to be gathered from the necessity or reason for its enactment. The several provisions of the legislative act should be construed together, in the light of its general objects and purposes, so as to give effect to the main intent. *Schutte v. Decker* 582
3. A court cannot read a meaning into a statute that is not warranted by the legislative language, nor can it read plain, direct, and unambiguous language out of the statute. *Schutte v. Decker* 582
4. Where the language of a statute is plain and unambiguous there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning. *Schutte v. Decker* 582
5. The fundamental principal of statutory construction is ascertainment of the intent of the Legislature. The court will not read into a statute exceptions not made by the Legislature. Where a statute is clear and unambiguous in its terms, it is the duty of the court, in construing a statute, to give the language used by the Legislature its plain and ordinary meaning. *Farrell v. School Dist. No. 54* 853
6. When the Legislature reenacts a law, it thereby adopts the judicial construction which has there-

tofore been placed upon it. *Farrell v. School Dist. No. 54* 853
7. The Legislature is presumed to have known the effect the statute originally had, and by its reenactment to have intended that such same effect should again be had. *Farrell v. School Dist. No. 54* 853

Taxation.
1. Municipal revenue bonds are obligations of a city even though they are not general obligations and not subject to payment through the exercise of the taxing power. *State ex rel. Beck v. City of York* 223
2. The assessment of property is not final until acted upon by the county and state boards of equalization, and not until the action of the latter is certified to the county clerks of the different counties and by them extended upon the tax rolls. *S. S. Kresge Co. v. Jensen* 833
3. Individual discrepancies and inequalities must be corrected and equalized by the county board of equalization. *S. S. Kresge Co. v. Jensen* 833
4. One aggrieved by the action of a county board of equalization may appeal to the district court. One who fails to pursue this remedy is precluded from objecting to the valuation of his separate property for taxation purposes and a collateral attack may not be made thereon except where the assessment is void, willfully discriminatory, or the result of fraud. *S. S. Kresge Co. v. Jensen* 833
5. It is the function of the county board of equalization to determine the actual value of property for tax purposes and give effect to the constitutional requirement that taxes be levied uniformly and proportionately upon all taxable property. *S. S. Kresge Co. v. Jensen* 833
6. Uniformity and proportionate taxation is a constitutional requirement, and prevails over statutory requirement that property be assessed at its actual value. *S. S. Kresge Co. v. Jensen* 833
7. The State Board of Equalization and Assessment cannot deal with individual assessments, nor take into consideration inequalities as between individual taxpayers. It deals only with the values of taxable property of a county in the aggregate. *S. S. Kresge Co. v. Jensen* 833
8. Collateral attack by taxpayer on valuation of his property is precluded by failure to exercise his

right to a hearing before county board of equalization. *S. S. Kresge Co. v. Jensen* 833
9. Although taxpayers have an interest which entitles them to protect the interest of a municipal corporation, the cause of action remains in the corporation and final relief is for its benefit. *Niklaus v. Abel Construction Co.* 842
10. If a taxpayer is permitted to maintain a taxpayer's suit, it is not in his individual right, but as the representative of the district whose interests are alleged to be jeopardized by the inefficiency or maladministration of its officers. *Niklaus v. Abel Construction Co.* 842
11. In a taxpayer's action potentially all of the taxpayers and citizens are parties. *Niklaus v. Abel Construction Co.* 842
12. Statute authorizing taxpayer's suit clearly recognizes that the cause of action is that of the city and not that of the citizen or taxpayer. *Niklaus v. Abel Construction Co.* 842
13. Where the officers of a public corporation refuse to act, a taxpayer may bring suit on behalf of himself and others similarly situated. The direct injury to be remedied where the taxpayer sets the judicial machinery in motion for that purpose is not personal and direct to himself, but to the corporation. *Niklaus v. Abel Construction Co.* 842
14. In an action instituted by a resident taxpayer, a court of equity will restrain public officers from illegally creating a debt or obligation which must be paid by taxation. *Farrell v. School Dist. No. 54* 853

Torts.

1. The relation of master and servant does not generally render the master liable for the torts of his servant, unless connected with his duties as such servant or within the scope of his employment. *Farr v. Cambridge Co-Operative Oil Co.* 45
2. If a servant does an act merely to frighten a third person or to perpetrate a joke on a third person, and the act is entirely disconnected from the purpose of the employment, the master generally is not liable therefor. *Farr v. Cambridge Co-Operative Oil Co.* 45
3. Duty of master to control his servant while the servant is acting outside the course of his employment stated. *Farr v. Cambridge Co-Operative*

Oil Co. 45
4. Where independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tortfeasor may be held for the entire damage. *Burhoop v. Bracken* 382
5. Where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tortfeasor may be held for the entire damage. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

Trial.

1. When a trial court sustains a motion for judgment notwithstanding the verdict, the party against whom it is sustained is entitled on appeal to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. *Holliday v. Patchen* 53
2. If the evidence is undisputed, or such that but one conclusion could reasonably be reached, whether or not a person riding in a motor vehicle is a guest is a matter of law for the court. *Holliday v. Patchen* 53
3. Where the record shows that a motion for a directed verdict should have been sustained at the close of the evidence, it is proper for the trial court to sustain a motion for judgment notwithstanding the verdict in favor of the party entitled to the directed verdict. *Holliday v. Patchen* 53
4. In an equity case tried to the court, the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant. The Supreme Court on appeal will not reverse a judgment in a case so tried because other evidence was introduced when there is relevant and competent evidence in the record to sustain the judgment of the trial court. *Koehn v. Koehn* 169
5. A court of equity will consider the substance and not the form. The particular form or words of a conveyance are unimportant if the intention of the parties can be ascertained. *Koehn v. Koehn* 169
6. Report of pre-trial hearing need not be offered in evidence or included in bill of exceptions. *Powell v. Farmers State Bank* 180
7. In testing the sufficiency of evidence to support a verdict it must be considered in the light most fav-

orable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of very inference that can reasonably be deduced therefrom. *Reynolds v. Knott* 365

8. It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them to the jury. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict for proponent. *Reynolds v. Knott* 365

9. To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury. It is sufficient that there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. *Reynolds v. Knott* 365

10. Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. *Burhoop v. Bracken* 382

11. If there is any evidence which will sustain a finding for the party having the burden of proof, the trial court may not disregard it and direct a verdict against him. *Burhoop v. Bracken* 382

12. In stating the issues of fact to the jury, the court should submit to the jury only such issues as are in controversy under the pleadings and which find support in the evidence. *Burhoop v. Bracken* 382

13. It is for the triers of fact to decide any issue upon all of the evidence adduced. This is true even when the more favorable evidence relied on by a party to overcome the effect of his own self-injurious statement is found in his own testimony. *Burhoop v. Bracken* 382

14. Rule for consideration of motion for directed verdict and for judgment notwithstanding the verdict stated. *Bezdek v. Patrick* 398

15. Instructions should be considered together in order that they may be properly understood. When as an entire charge instructions properly submit the issues to the jury, the verdict will not be set aside. *Bezdek v. Patrick* 398

16. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was

the result of passion, prejudice, or mistake, or where it is clear that the jury disregarded the evidence or controlling rules of law. *Bezdek v. Patrick* 398

17. If, from undisputed evidence, different minds may not reasonably reach different conclusions or draw different inferences, the trial court should render judgment consistent with the facts. *Leach v. Treber* 419

18. If the evidence is insufficient to sustain a verdict in favor of the plaintiff, the trial court may instruct a verdict for defendant or discharge the jury and dismiss the case. *Akins v. Chamberlain* 428

19. A motion of a litigant to dismiss because of insufficiency of evidence to sustain a recovery has the identical purpose and should be treated the same as a motion for a directed verdict. *Akins v. Chamberlain* 428

20. Rule for consideration of motion for directed verdict by the defendant stated. *Anderson v. Evans* 599

21. No proof is required as to the existence of a fact admitted by the pleadings. *Anderson v. Evans* 599

22. The giving of oral instructions to a jury in regard to the principles of law applicable to the case and the evidence, in the absence of waiver of written instructions, is reversible error. *Anderson v. Evans* 599

23. When on direct examination an objection to a question is interposed by the adverse party and sustained, there must be an offer of proof of the facts sought to be put in evidence by the question in order to present the ruling for review in the Supreme Court. *Parker v. State* 614

24. Where counsel for the State referred in argument to the jury to facts not in evidence, and on objection that the statements were unwarranted by the evidence the court instructed the jury to disregard such statements, there was left no ground for complaint. *Parker v. State* 614

25. A motion for new trial in a criminal action must be filed within 10 days after the verdict is rendered in order to be considered on appeal, except for the cause of newly discovered evidence or unless the defendant was unavoidably prevented from filing the motion within 10 days. *Parker v. State* 614

26. Where, in a jury trial, a defendant, when plaintiff rests, moves for a verdict in his favor and upon the overruling of such motion proceeds with the

trial and introduces evidence in support of the defenses set up in his answer, he thereby waives the right to assign error in the ruling upon such motion. *Buhrman v. Smollen* 655

27. A judgment will not be reversed for error in overruling a motion for a directed verdict at the close of plaintiff's case when certain essential testimony was not then in the record, when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record, unless its admission is assigned as error in the Supreme Court and the assignment is sustained. *Buhrman v. Smollen* 655

28. In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict. *Buhrman v. Smollen* 655

29. It is the duty of the trial court to present to the jury those issues which are raised by the pleadings and which find support in the evidence. *Buhrman v. Smollen* 655

30. Instructions to a jury must be considered together. If as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof. *Buhrman v. Smollen* 655

31. It is proper for the trial judge to aid in preventing misconception by properly directed questions or remarks. *Buhrman v. Smollen* 655

32. There is no impropriety in a trial court interrogating witnesses regarding a fact under investigation when the tendency is only to develop the truth and is calculated in nowise to influence the jury save as the testimony will assist it to arrive at a correct conclusion on the questions of fact in issue. *Buhrman v. Smollen* 655

33. Considerable latitude must be allowed counsel at the commencement of a trial in making the opening statement in which he states the evidence by which he expects to sustain his cause of action or defense. *Buhrman v. Smollen* 655

34. The submission of a cautionary instruction that the jury is not to allow sympathy or prejudice to control or affect its finding is within the sound discretion of the trial court. *Buhrman v. Smollen* 655

35. A cautionary instruction should be given, if requested, where the circumstances of the trial and the evidence of the case is such as is likely to ap-

peal strongly to the sympathy of jurors. *Buhrman v. Smollen* 655
36. In a prosecution for the embezzlement of gasoline, the amount to be allowed for normal shrinkage is a jury question. *Hoffman v. State* 679
37. An error by the jury in calculating the amount embezzled is not material where it does not have the effect of changing the punishment of the defendant to his prejudice. *Hoffman v. State* 679
38. Rule for consideration of motion for directed verdict stated. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704
Ecker v. Union P. R. R. Co. 744
Bear v. Auguy 756
39. Physical facts are sufficient to warrant a directed verdict in an automobile collision case when they conclusively demonstrate that the collision out of which the injuries arose was not caused by any negligence on the part of the party making the motion. Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704
40. While it is not the duty of the court reporter to take down the arguments to the jury unless he is directed to do so, he should be available. If objections are made or controversy arises during the course of the argument, the court should direct a record to be made thereof. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704
41. A trial court may in its discretion permit counsel, in addressing the jury, to display and use drawings, diagrams, or maps, not put in evidence, by way of illustration or elucidation of evidence actually adduced, provided the jury understands that they are employed merely for such purposes and are not of themselves evidence in any sense. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704
42. It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and evidence, and such rule applies in negligence cases. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704
43. The purpose of an instruction is to furnish guidance to the jury in its deliberations, and to aid it in arriving at a proper verdict. An instruction

should state clearly and concisely the issues of fact and the principles of law which are necessary to enable it to accomplish the purpose desired. *Egenberger v. National Alfalfa Dehydrating & Milling Co.* 704

44. Where the evidence adduced to sustain issues of negligence and proximate cause are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the issues as a matter of law rather than submit them to a jury for determination. *Ecker v. Union P. R. R. Co.* 744

45. Where different minds may reasonably draw different conclusions from the evidence, or if there is a conflict in the evidence, as to whether or not the evidence establishes negligence or contributory negligence and the degree thereof, when one is compared with the other, such issues must be submitted to a jury. *Bear v. Auguy* 756

46. Where the excessive amount in a judgment is subject to exact determination, a remittitur may be required as a condition of affirmance for the correct amount. *Bear v. Auguy* 756

47. A defendant waives the right to assign error in a ruling on motion for directed verdict at the close of plaintiff's evidence where he proceeds with the trial and introduces evidence in support of the defenses in his answer. *Schaffer v. Strauss Brothers* .. 773

48. An instruction as to effect of previous threats, taken together with other instructions given by the trial court, stated the law correctly. *Elliott v. Brandt* 790

Trusts.

1. Every man has a trust to whom a business is committed by another. Every man is a trustee whose office is to advise or to operate, not for himself, but for others. *James v. McNair* 1

2. The rules of equity as to fiduciary relations are not restricted to attorney and client, nor to similar conventional relations, but extend to all cases, where, on one hand, confidence is properly reposed, and, on the other, knowledge or authority or influence arises from any cause. *James v. McNair* 1

3. A person gratuitously assuming as agent or trustee to control or manage the property or interests of another is as firmly bound by the implied terms of his confidential relation as one who is regularly employed and paid. *James v. McNair* 1

4. The burden of establishing a constructive trust requires evidence that is clear, satisfactory, and convincing. *Slocum v. Bohuslov* 156
5. A joint deposit in a bank in the name of two persons is not, upon the death of one of them, conclusive of the ownership of the deposit by the surviving co-owner as between him and a third person who claims that the surviving owner holds the legal title to the deposit in trust for the third party. *Nelson v. Rasmussen* 274
6. Rule for creation of constructive trust arising out of confidential relations stated. *Nelson v. Rasmussen* 274
7. The burden of establishing a constructive trust is always upon the person who bases his rights thereon and he must do so by evidence that is clear, satisfactory, and convincing. *Nelson v. Rasmussen* 274
8. An officer or director of a corporation occupies a fiduciary relation to the corporation and is treated by a court of equity as a trustee. *Stillinger & Napier v. Central States Grain Co., Inc.* 458

United States.

1. A United States savings bond is a contract between the federal government and the purchaser. Treasury Department regulations governing such bonds are incorporated into the contract by reference and are beyond the reach of state law to modify or destroy. *Slocum v. Bohuslov* 156
Nelson v. Rasmussen 274
2. If a United States savings bond is registered in the names of two persons as co-owners, the rights of the surviving co-owner arise solely by contract. *Slocum v. Bohuslov* 156
Nelson v. Rasmussen 274
3. A surviving co-owner of a United States savings bond takes title thereto as sole owner by reason of Treasury Department regulations incorporated in the contract between the federal government and the purchaser of the bond. *Slocum v. Bohuslov* 156
Nelson v. Rasmussen 274

Usury.

1. A truck dealer may in good faith sell a truck on time for a price in excess of the cash price without tainting the transaction with usury, even though the

difference in the two prices may exceed lawful interest for a loan. *McNish v. General Credit Corp.* 526

2. A time sale made in good faith at a price in excess of a cash price, which time price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not necessarily be regarded as being tainted with usury, even though the difference exceeds the lawful rate of interest for a loan. *McNish v. General Credit Corp.* 526
McNish v. Grand Island Credit Co. 543

3. To avoid the charge of usury, it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash sale price. It is not enough to merely show that the instruments signed evidencing the indebtedness refer to a time price or time differential when, in fact, the buyer was never quoted a time sale price as such. *McNish v. General Credit Corp.* 526

4. The statutes make no requirement that a borrower, in order to come within the provisions thereof, must be a necessitous one. The statutes relating to installment loans have no requirements of any kind in that respect. *McNish v. General Credit Corp.* 526

Wills.

1. One seeking specific performance of an oral contract to will property has the burden not only of proving the contract but also that he has performed the obligations imposed upon him thereby. *Drew v. Hawley* 141

2. An interested third person who seeks to enforce an oral contract to will property has the burden not only of proving the contract but also that the obligations imposed by the contract have been performed. *Drew v. Hawley* 141

3. Where a will is shown to have been made and left in the custody of the testator, if it cannot be found after his death, the presumption is that the testator destroyed it animo revocandi. *Drew v. Hawley* 141

4. The presumption that a will has been destroyed animo revocandi is one of fact, and it may be overcome by evidence, circumstantial or otherwise, to the contrary. *Drew v. Hawley* 141

5. Burden of proof of establishing undue influence and the elements thereof stated. *Drew v. Hawley* 141

6. A will, made and left in the custody of the testator, that cannot be found after his death is presumed to have been destroyed by him with the intention of revoking it. *Nelson v. Rasmussen* 274
7. A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein but it does require that he have testamentary capacity and that the will was not procured by undue influence. *Reynolds v. Knott* 365
8. Burden of proof resting upon contestants to sustain charge of undue influence stated. *Reynolds v. Knott* 365
9. Undue influence cannot be inferred from motive or opportunity alone. There must be competent evidence, direct or circumstantial, to show that undue influence not only existed but that it was exercised at the very time the will was executed. *Reynolds v. Knott* 365
10. Mere suspicion, surmise, conjecture, or speculation is not enough to warrant a finding of undue influence, but there must be a solid foundation of established facts upon which to rest an inference of its existence. *Reynolds v. Knott* 365
11. There may be influences directing the attention of the maker of a will to proper obligations which it might be thought ought to be satisfied by testamentary provisions. Such influences may be persuasive and effective, but so long as not coercive, they are not undue influence. Circumstances often arise where such conduct is proper and wholly justifiable. *Reynolds v. Knott* 365
12. In order to invalidate a will duly executed by a testator having testamentary capacity, undue influence must be of such character as to destroy the free agency of the testator and substitute another's will for his own. *Reynolds v. Knott* 365
13. It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them to the jury. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict for proponent. *Reynolds v. Knott* 365
14. In the construction of a will, the court is required to give effect to the true intent of the testator so

far as it can be collected from the whole instrument, if such intent is consistent with the rules of law. *McLaughlin v. Heath* 511

15. Parol evidence is inadmissible to determine the intent of a testator as expressed in his will, unless there is a latent ambiguity therein which makes his intent obscure or uncertain. *McLaughlin v. Heath* 511

16. Where in a will there is a patent ambiguity resulting from the use of words, and nothing appears within its four corners to resolve or clarify the ambiguity, the words must be given their generally accepted literal and grammatical meaning. *McLaughlin v. Heath* 511

17. A will speaks as of the date of the death of the testator. *McLaughlin v. Heath* 511

18. Evidence to support a contention that a will is enforceable by reason of a contractual obligation must be clear, satisfactory, and unequivocal. *McLaughlin v. Heath* 511

Witnesses.

1. Rule governing admissibility of evidence of transaction or conversations with a person since deceased stated. *Koehn v. Koehn* 169

2. A party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion. *Leach v. Treber* 419
Ecker v. Union P. R. R. Co. 744

3. A party is entitled to the benefit of the testimony of other witnesses in contradiction of his own testimony, whenever such testimony is not a judicial admission and concerns only some evidential or constituent circumstance of his case. *McNish v. General Credit Corp.* 526

Work and Labor.

1. Where a statute prohibits a county from making a contract, and avoids the obligation of the contract for so doing, a recovery quantum meruit cannot be had. *Capital Bridge Co. v. County of Saunders* 304

2. Where a contract has been entered into in good faith with a county, which contract is within the power of the county to make but is void for the

reason that statutory requirements were not complied with, an action in quantum meruit for the service performed or material furnished may be maintained. *Capital Bridge Co. v. County of Saunders* 304

3. The right to recover in quantum meruit for service performed or material furnished under a void contract with a county exists up to the limit of, and not beyond, that which would have been recoverable under a valid contract covering the same subject matter. *Capital Bridge Co. v. County of Saunders* 304

Workmen's Compensation.

1. A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment. *McCauley v. Harris* 216
2. In order to recover, the burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment. *Towner v. Western Contracting Corp.* 235
3. To recover under the workmen's compensation law, facts must be proved by the claimant by sufficient evidence leading to the direct conclusion, or by a legitimate legal inference therefrom, that an accidental injury occurred and caused the disability. There must be shown a causal connection between an accident suffered by the claimant and his disability. *McCauley v. Harris* 216
4. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant shall prove his right to compensation nor does it permit a court to award compensation where the requisite proof is lacking. *McCauley v. Harris* 216
5. A compensation award cannot be based on possibilities, probabilities, or speculation. If an inference favorable to the claimant can only be reached on the basis thereof then he cannot recover. *McCauley v. Harris* 216
6. Where there have been two accidents to an employee, the question of whether the disability sustained by him should be attributable to the first

accident or to the second accident depends on whether or not the disability sustained was caused by a recurrence of the original injury or by an independent intervening cause. *Towner v. Western Contracting Corp.* 235

7. If a second injury is but a recurrence of the original injury, compensation therefor must be paid by the employer and insurance carrier at the time of the first injury. *Towner v. Western Contracting Corp.* 235

8. Where the first accident was not a proximate cause of the second accident, the second accident constitutes an independent intervening cause. *Towner v. Western Contracting Corp.* 235

9. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence. *Towner v. Western Contracting Corp.* 235

10. An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo on the record. *Sears v. City of Omaha* 869

11. The burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by him in an accident arising out of and in the course of his employment. *Sears v. City of Omaha* 869